(21,246.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 190.

CINCINNATI, INDIANAPOLIS AND WESTERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

CITY OF CONNERSVILLE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 30, 1909.

a Be it remembered, That heretofore, to-wit: On the 5th day of April, 1907, the same being the 113th Judicial Day of the November Term, 1906, of the Supreme Court of Indiana, the Cincinnati, Indianapolis and Western Railway Company, by Elam & Fesler, Forkner & Forkner and Reuben Connor, its attorneys, filed in the office of the Clerk of the Supreme Court of Indiana, a transcript of the record and proceedings of the Henry Circuit Court of Henry County, Indiana, in a cause wherein The City of Connersville was plaintiff and the Cincinnati, Indianapolis and Western Railway Company was defendant, together with an assignment of errors indorsed thereon, and notice of said appeal was issued to the Sheriff of said Supreme Court to be served on said City of Connersville according to law. And which said transcript and assignment of errors are in the words and figures following, to-wit:

1 Pleas before the Honorable John M. Morris, Judge of the Henry Circuit Court, at a term of said Court, held at the Court House in the County of Henry, State of Indiana, commencing on the first Monday of October, 1906.

Complaint No. 1342.

CITY OF CONNERSVILLE
vs.
CINCINNATI, INDIANAPOLIS & WESTERN RAILROAD COMPANY.

Transcript from Fayette Co. Filed.

Be it remembered, That on the 25th day of January, 1906, the following transcript, on change of venue, of the above entitled cause, was taken from the Fayette Circuit Court, within and for Fayette County, Indiana, and that said transcript was transmitted to and filed in the Henry Circuit Court, within and for Henry County, Indiana, on the 27th day of January, 1906, said transcript being in the words and figures following, to-wit:

#5232.

CITY OF CONNERSVILLE
vs.
CINCINNATI, HAMILTON & WESTERN RAILROAD COMPANY.

Pleas and proceedings had in the above entitled cause in the Fayette Circuit Court of the State of Indiana, at the December Term, 1905, of said Court, before the Honorable George L. Gray, Sole Judge of said Court.

And be it remembered that on the 3rd day of January, 1906, the same being the 15th Judicial day of said December Term of said

Court continued at the Court House in the City of Connersville, before the Honorable George L. Gray, Sole Judge of said
2 Court, the following proceedings were had in said cause, to-wit:

#5232.

CITY OF CONNERSVILLE
VS.
CINCINNATI, HAMILTON & WESTERN RAILROAD COMPANY.

Transcript of Council Proceedings Filed.

At this day comes the defendant and files in open Court the transcript of the proceedings had before the Common Council of the City of Connersville in said above entitled cause, which transcript reads as follows, to-wit: (H. I.)

And be it remembered that afterwards to-wit: on the 13th day of January, 1906, same being the 24th Judicial day of said Term of said Court continued as aforesaid before the Honorable George L. Gray, Sole Judge of said Court, the following further proceedings were had in said cause, to-wit:

#5232.

CITY OF CONNERSVILLE
VS.
CINCINNATI, HAMILTON & WESTERN RAILROAD COMPANY.

Motion for Change of Venue Filed.

At this day comes the plaintiff by David W. McKee, its attorney; comes also the defendant by Conner & Conner its attorneys; thereupon defendant filed its written motion supported by affidavit asking a change of venue of this cause from Fayette County, Indiana; said motion and affidavit reads, to-wit: (H. I.)

Def't's Exceptions Filed.

Thereupon defendant files its written exceptions to the appropriation of the City Commissioners and City Council, which said exceptions read, to-wit: (H. I.)
3 And the Court sustains said motion for a change of venue and sends this cause to Henry County, Indiana, and ten (10) days are given in which to pay the costs of such change.

Venue Changed to Henry Co.

It is therefore considered and adjudged by the Court that the venue of this cause be and the same is hereby changed from Fayette

County, Indiana, to Henry County, Indiana, and the Clerk of this Court is hereby ordered and directed to forward all papers, together with a transcript of the proceedings had in this cause to the Clerk of the Henry Circuit Court.

Certificate to Transcript.

STATE OF INDIANA,
County of Fayette, ss:

I, Albert L. Chrisman, Clerk of the Fayette Circuit Court, within and for said County and State, do hereby certify the above and foregoing to be a full, true and complete transcript of the proceedings had in the cause of City of Connersville vs. Cincinnati, Hamilton & Western Railroad company as the same appears of record in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at Connersville this 25th day of January, 1906.

[SEAL.] ALBERT L. CHRISMAN,
Clerk of the Fayette Circuit Court.

Papers Transmitted.

Be it further remembered, That the following papers in the above entitled cause heretofore filed in the Fayette Circuit Court, were transmitted to and filed in the Henry Circuit Court on the 27th day of January, 1906, which said papers are in the words and figures following, to-wit:

4 STATE OF INDIANA,
Fayette County, ss:

In the Matter of THE CITY OF CONNERSVILLE vs. THE CINCINNATI, INDIANAPOLIS AND WESTERN RAILROAD COMPANY Regarding the Opening of Grand Avenue through the Railroad Embankment.

Transcript of the Proceedings in said Matter Had Before the Common Council of said City.

Minute Record "E," page 218. September 5th, 1904.

On motion of Miller the following resolution was adopted:

Resolution for Opening Street.

Whereas the railroad embankment which crosses Grand Avenue in the City of Connersville, in Fayette County, Indiana, between Ninth and Eleventh streets obstructs the passage between the North and South ends of said street, and whereas it is by many considered and believed to be a matter of public necessity that said Grand Avenue be opened up as a public street through said railroad em-

Report of Committee on Resolution.

bankment, now therefore be it resolved by the Common Council of said City of Connersville that the expediency of referring the matter of opening up said street through said railroad embankment to the City Commissioners of said City be, and the same is hereby referred to the Committee on streets, Alleys and Bridges of said City, and said Committee is hereby directed to make its report at the next regular meeting of this Common Council.

Page 223. September 19th, 1904.

Committee on Streets, Alleys and Bridges reported as follows:

"Report of Committee on Streets, Alleys, and Bridges.

5 The undersigned hereby report that they deem it expedient to refer the opening of Grand Avenue through the C. I. & W. railroad to the City Commissioners. Signed this 19th, day of September, 1904.

WILLIAM MERRELL,
CHAS. REIDER,
SIMON DOENGES,
Comt.

Page 334. September 19th, 1904.

The following resolution was read and on motion adopted by unanimous vote of the Council:

Resolution Adopted by City Council.

Whereas it is thought to be advisable and necessary by many of the citizens and tax payers of this city to open up Grand Avenue through the Railroad embankment which crosses said street between 9th and 11th Streets, and whereas the Committee on Streets, Alleys and Bridges, to which the expediency of referring the matter of the proposed opening of said street, to the City Commissioners, has reported in favor of making such reference; Now therefore be it resolved by the Common Council of the City of Connersville, that the question of the advisability and public utility of opening up said Grand Avenue through the railroad embankment crossing the same between 9th and 11th Streets, in said City be and the same is hereby referred to the City Commissioners of said City *Commissioners of said City* and said City Commissioners are hereby directed to meet at the council chamber in said city on October 6th, 1904, at 9 o'clock in the forenoon and that after due consideration said commissioners shall report to the Council, and the Clerk is directed to notify said Commissioners of this reference and of the time and place of their meeting.

City Commissioners to Report.

Minute Record "E," Page 239. November 7th, 1904.

6 It appearing that the present City Commissioners were not eligible to serve in opening Grand Avenue under the railroad, the following were appointed in their places, Wm. Newkirk, Ward Jemison, William Sherry, William Heeb Jr. and J. C. Turkenkoph.

Page 243. December 5th, 1904.

It appearing that William Newkirk and William Heeb Jr. are interested in opening Grand Avenue, on motion S. O. McKennan was substituted for William Newkirk, and William T. Edwards for Wm. Heeb Jr. and December 21", 1904, was set as the time and the council room as the place for the meeting of said City Commissioners.

Commissioners to Be Notified.

CONNERSVILLE, INDIANA, *December 5th*, 1904.

To Frank Elwood, marshal of city of Connersville, Indiana:

You are hereby directed to notify Wm. T. Edwards, J. C. Turkenkoph, William Sherry, S. O. McKennan and Ward Jemison, City Commissioners pro tem of the City of Connersville, that the Common Council of the City of Connersville, in regard to the opening of Grand Avenue, has fixed Wednesday, December 21st, 1904, at 9 o'clock A. M. at the Council Chamber in the city of Connersville Fayette County, Indiana, as the time and place when and where said City Commissioners shall meet to designate the lots and parcels of ground, and the names of the owners thereof, benefited or damaged by said improvements. By order of Council.

JACOB S. CLOUDS,
City Clerk.

Page 252. Feb. 6th, 1905.

Report of the City Commissioners designating the lots and parcels of ground benefited or damaged by the opening of said Grand Avenue and the one setting the time to make the assessment were received and placed on file.

Report of the City Commissioners.

7 To the Common Council of the City of Connersville, Fayette County, Indiana:

Report of Commissioners.

We, the undersigned City Commissioners of said City to whom your honorable body has referred the matter of the proposed opening up of Grand Avenue in said City through the railroad embank-

ment which crosses the line of said street between 9th and 11th Streets in said City, would respectfully report that pursuant to the notice given by the Clerk of said Council, we met at the City Hall on the 20th day of December, 1904, and proceeded to examine the property sought to be appropriated by the opening of said street and to view and examine the real estate in the vicinity thereof to be benefited or injured by such proposed improvement and we find that the opening of said Avenue through said railroad embankment would be of public utility and that the real estate to be appropriated by the opening of said Grand Avenue is so much of said railroad embankment as extends the entire width of said Grand Avenue as now used and opened immediately North of and South of said railroad embankment, and being sixty-six (66) feet in width and of the length of about sixth-six (66) feet, being all the real estate that lies North of the end of said Grand Avenue North of 9th street as said Grand Avenue is now opened and used and south of the end of Grand Avenue south of 11th Street as said Grand Avenue is now opened and used. The tract to be appropriated being a tract of ground sixty-six (66) feet square and occupied by said railroad embankment. That the owners of said real — sought to be appropriated are the Cincinnati Hamilton and Dayton Railway Co., the Cincinnati, Hamilton and Indianapolis Railway Co., or the Cincinnati, Indianapolis and Western Railway Co., or one or two of them these Commissioners being unable to inform themselves as to which, and the legatees under the will of Abraham B. Conwell, deceased. The last named own the fee simple thereof and the said railroad company or companies own the railroad right of way to which fee simple is subject. And we find that no real estate will be damaged by such opening other than the real estate so sought to be appropriated, and we further find that the real estate abutting on both sides of said Grand Avenue, between 11th and 9th Streets will be beneficially affected by said opening, all of which real estate is situated in the South east quarter of Section twenty-four (24), Township Fourteen (14) Range Twelve (12) in the City of Connersville, County of Fayette, State of Indiana, and we further find that said real estate above described as beneficially affected is owned by John P. Wilkin, Sabina Patton, William Bearley, Catherine Welsh, David W. McKee, Carrie F. Theders, David H. Showalter, Francis T. Roots, Charles Winters, Mary Heeb, Malinda Bertsch, Meman Jones, Henry Luking heirs Theodore P. Heinemann and John H. Rieman, as follows:

Embankment Appropriated.

Other Property.

8

On West side of Grand Avenue.

John T. Wilkin, tract with frontage thereon of 169 5/10 feet, as described in town lot Deed Record 12, page 43, of said County, benefit $19.70

Sabina Patton, tract with frontage with 49 feet thereon, as described in Town Lot Record 13, page 216 of said County $5.72

William Bearly, tract with 33-1/3 feet frontage thereon, described in Town Lot Record 13, page 260 of said County $3.89

David W. McKee, tract of 57-3/10 feet frontage thereon, as described in Town Lot Record 10, page 388 of said County..... $6.68

Catherine Welsh, tract of about 60 feet frontage thereon, and being all of the tract described in Town Lot Record 4, page 180 in said County, except the tract described in Town Lot Record 10, page 388, as owned by said David W. McKee $7.00

Other Property.

Carrie F. Theders, the part of Lot one (1) in Conwell's Northwest Addition to said City, fronting thereon that is described in Town L. Record 13, page 262 of said County. Frontage 104 ..... $12.09

David H. Showalter, Lots Two (2) and Three (3) of Conwell's Northwest Addition to said City. Frontage 165.. $19.25

On East side of Grand Avenue, as follows:

Francis T. Roots, real estate with 165 feet frontage thereon, as described in Town Lot Record No. 8, page 499 of said County. $19.25

Charles Winters, real estate with 40.5 frontage thereon, as described in Town Lot Record 7, page 547, of said County.. $4.73

Mary Heeb, real estate with 41.25 feet frontage thereon, as described in Town Lot Record 8, page 562, of said County. $4.82

Malinda Bertsch, real estate with 41.25 feet frontage thereon as described in Town Lot Record 9, page 425, of said County..... $4.82

Other Property.

Heman Jones, real estate with 41.25 feet frontage thereon, as described in Town Lot, Record 5, page 578, of said County. $4.82

Heirs of Henry Luking (names of which are unknown) real estate with 36 feet frontage thereon, as described in Deed Record 6, page 160, of said County..... $4.20

Theodore P. Heineman, Lot No. Six (6), Block Three (3) of Conwell's North Addition to said City fronts 118..... $13.78

John H. Rieman, Lots Five (5) and Four (4), Block Three (3) of Conwell's Addition to said City, 165..... $19.25

All of which is respectfully submitted.
This 4th day of January, 1905.

SAMUEL O. McKENNAN,
WILLIAM T. EDWARDS,
JULIUS C. TURKENKOPH,
WARD JEMISON,
WM. H. SHERRY,
City Commissioners.

Notice of Assessment of Damages.

To the Common Council of the City of Connersville and all others Concerned:

The undersigned City Commissioners in the matter of the opening of Grand Avenue through the Railroad embankment between 11th and 9th streets in said City hereby give notice that they will, on Wednesday, the 1st day of March, 1905, at the City Hall in said City of Connersville meet to estimate the injuries and benefits to the property sought to be appropriated and the benefits and damages to all real estate injuriously or beneficially affected by the opening of said Grand Avenue.

All of which is respectfully submitted.

Witness our names this 4th day of January, 1905.

SAMUEL O. McKENNAN,
WILLIAM T. EDWARDS,
JULIUS C. TURKENKOPH,
WARD JEMISON,
WM. H. SHERRY,
City Commissioners.

Marshall to Notify Parties.

Office of Jacob S. Clouds, City Clerk.

CONNERSVILLE, INDIANA, *Jan. 23"*, 1905.

To Frank Elwood, Marshal*l* City of Connersville:

You are hereby directed to notify John T. Wilkin, Sabina Patton, William Bearly, David W. McKee, Caroline Welsh, Carrie F. Theders, David H. Showalter, Francis T. Roots, Charles Winters, Mary Heeb, Malinda Bertsch, Heman Jones, Theodore P. Heineman, John H. Reiman, and Henry Luking heirs, that the report of the City Commissioners designating the lots and parcels of ground benefited or damaged by the opening of Grand Avenue under the C. I. and W. Railroad, has been filed with the City Clerk and said Commissioners have fixed Wednesday March 1st, 1905, at the City Hall in the City of Connersville, Fayette County, Indiana, as the time and place when and where said City Commissioners will meet to assess the benefits and damages on account of said opening of said Grand Avenue, at which time all persons interested are entitled to a hearing.

JACOB S. CLOUDS,
City Clerk.

Notice Served.

Having served the contents here named within by reading to each party named.

FRANK ELWOOD.

12 **Notice of Meeting of City Commissioners on Benefits and Damages in Opening Grand Avenue and the C., H. & I., or C., I. & W. Railroad.**

Notice.

CONNERSVILLE, INDIANA, *Jan.* 10, 1905.

Notice is hereby that the report of the City Commissioners designating the lots and parcels of ground benefited or damaged by the opening up of Grand Avenue under the C. H. and I., or C. I. and W. railroad between 9th and 11th Streets in the City of Connersville, Fayette County, Indiana, has been filed with the City Clerk, of the city of Connersville, Indiana, and that said City Commissioners have fixed Wednesday the 1st day of March, 1905, at the City Hall in said City of Connersville as the time and place when and where said City Commissioners will meet to estimate the injuries and benefits to the property sought to be appropriated and the benefits and damages to all real estate injuriously or beneficially affected by the opening of said Grand Avenue.

By order of City Commissioners:

JACOB S. CLOUDS,
City Clerk.

Editor's Affidavit.

Notice Published.

STATE OF INDIANA,
Fayette County, ss:

Personally appeared before the undersigned, John W. Fawcett, Jr., manager of the Examiner, public daily Newspaper of general circulation printed and published in Connersville in the County aforesaid, who being duly sworn upon his oath says that the notice of which the attached is a true copy, was duly published in said paper for 4 time- successively, the first of which publication- was on the 10th day of Jan. 1905, and the last on the 31 day of Jan. 1905.

JOHN W. FAWCETT, JR.

Subscribed and sworn to before me, this 1st day of March,
13 1905.

[SEAL.] JACOB S. CLOUDS,
City Clerk.

Notice to Ry. Co.

CONNERSVILLE, INDIANA. *March 4th*, 1905.

To the Cincinnati, Hamilton and Dayton Railway Co., the Cincinnati, Hamilton and Indianapolis Railway Co., and the Cincinnati, Indianapolis & Western Railway Co.:

You are hereby notified that the City Commissioners will meet at the Council Chamber in the City Hall, in the City of Conners-

ville, Fayette County, Indiana, on Wednesday March 15th, 1905, between the hours of nine o'clock A. M. and Four o'clock P. M. for the purpose of estimating injuries and benefits, and do such other things as may be necessary and in accordance with their duties as prescribed by statute in the opening of Grand Avenue in said City under the railroad of one of the above named Companies.

Witness my hand this 4th day of March, 1905.

JACOB S. CLOUDS,
City Clerk.

Notice Served.

Served by reading to J. L. Graff and E. Wysong, agents of the Cincinnati, Hamilton and Dayton Railway Co., residing within said City, having been unable to find any agent, officer or employee of either of the other Railroad Companies within said City or County.

This 4th day of March, 1904.

FRANK ELWOOD,
City Marshal.

Page 264. April 17th, 1905.

Report of City Commissioners on opening of Grand Avenue, as follows:

The undersigned City Commissioners, pro tempore, of the City of Connersville, State of Indiana, respectfully report in the matter of opening Grand Avenue through the Railroad embankment
14 which crosses the line, or end of said street between 9th and 11th Street- in said City, that pursuant to the notice filed with said Clerk of said City, and filed with the former report in this matter, that they met at the City Hall in said City at Two o'clock P. M. on March 1st 1905, and they entered upon the consideration of the matter of opening said Grand Avenue as above and of the parties found to be benefited in former report there *was* present or represented David W. McKee, Charles Winters, Mary Heeb, Malinda Bertsch, Heirs of Henry Luking and John H. Rieman, and it appearing that the City Clerk had issued a notice to all the parties found to be benefited in the former report and that the marshal/ of said City has served such notice at least 10 days before said 1st of March, 1905, and that the City Clerk had caused a like notice to be published as required by law to the Cincinnati, Hamilton and Dayton Railway Company, the Cincinnati, Indianapolis and Western Railway Company, and the Cincinnati, Hamilton and Indianapolis Railway Company, but it further appearing that one or two or all of said Railway Companies had officers or agents residing in said City, said Commissioners adjourned to meet at the same place on March 15th, 1905, and ordered the said City Clerk to issue notice to said Companies and caused the same to be served by the Marshal/ of said City ten days before said 15th day of March, of the meeting of these Commissioners as required by law. Thereupon said City Commissioners met pursuant to adjournment on March 15th, 1905, at the City

Commissioners' Report.

Hall at Two o'clock P. M. At such meeting there was present Theodore P. Heineman and also E. Wysong, Superintendent of Bridges of the Cincinnati, Hamilton and Dayton Railway Company, T. M. Little, who was attorney for the Cincinnati, Hamilton and Dayton Railway Company, while disclaiming to appear for said Rail-
15 way Company severely criticised these Commissioners for their proposed action in this matter. Thereupon they determined values and benefits and do hereby now report in said matter as follows:

Property Appropriated.

Property to be appropriated:

That it will be necessary to appropriate the following property of the value named:

Description: Part of the Southeast Quarter of Section Twenty-Four (24), Township Fourteen (14), Range Twelve (12), in Fayette County, State of Indiana, and described: All that tract of land occupied by the railroad embankment, between 9th and 11th Streets in the City of Connersville, that lies between the North *Ry. Property.* and South ends of Grand Avenue as now opened and used, and at the foot of the said railroad embankment, and running thence North with the East line of said Grand Avenue extended a distance of sixty-six (66) feet more or less to the South East corner of said Grand Avenue, as now opened and used, on the North of said railroad embankment; thence west along the foot of said railroad embankment and across the South end of said Avenue sixty-six (66) feet more or less to the Southwest corner of said Grand Avenue; thence south on the west line of said Grand Avenue extended Sixty-six feet (66) more or less to the Northwest corner of said Grand Avenue as now used and opened South of said Railroad embankment and to the foot of said railroad embankment; thence Eastwardly across the North end of said Grand Avenue and with the foot of said Railroad embankment *Damages to Ry. Co.* Sixty-six (66) feet more or less to the place of beginning, and that said real estate so proposed to be appropriated is of the value of $150.00, and its ownership is either in the Cincinnati, Hamilton and Dayton Railway
16 Company, the Cincinnati, Indianapolis and Western Railway Company, or the Cincinnati, Hamilton and Indianapolis Railway Company but these Commissioners were not able to ascertain which but they think probably it is owned by the Cincinnati, Hamilton and Dayton Railway Company, though they hereby report that such owner's name is unknown to them.

Property that will be damaged:

None.

Benefits to Other Property.

Property that will be benefited:

The following property located on said Grand Avenue, between 9th and 11th Streets, will be benefited in the amounts named.

On the West side of Grand Avenue.

Owned by John T. Wilkin, tract with the frontage thereon of 169 5/10 feet, as described in Town Lot Deed Record 12, page 43 of said County, benefit $19.70

Owned by Sabina Patton, tract with frontage of 49 feet thereon as described in Town Lot Record 13, page 216 of said County, benefit $5.72

Owned by William Bearly, tract with 33¼ feet frontage thereon as described in Town Lot Record 13, page 260, of said County, benefit $3.89

Owned by David W. McKee, tract of 57.3 feet frontage thereon as described in Town Lot Record 10, page 388, of said County, benefit $6.68

Owned by Catherine Welsh, tract of about 60 feet frontage thereon, and being all the tract described in Town
17 Lot Record 4, page 180 in said County except the tract described in Town Lot Record 10, page 388, as owned by said David W. McKee, benefit $7.00

Owned by Carrie F. Theders, the part of Lot 1, in Conwell's Northwest Addition to said City, fronting thereon that is described in Town Lot Record 13, page 263 of said County, frontage 104 feet, benefit $12.09

Owned by David H. Showalter, Lots Two (2) and Three (3) of Conwell's Northwest Addition to said City, frontage 165 feet, benefit $19.25

Benefits to Other Property.

On east side of Grand Avenue as follows:

Owned by Francis T. Roots, real estate with 165 feet frontage thereon, as described in Town Lot Record No. 8, page 499 of said County benefited $19.25

Owned by Charles Winters, real estate with 40.5 feet frontage thereon, as described in Town Lot Record No. 7, page 546, of said County, benefit $4.73

Owned by Mary Heeb, real estate with 41.25 feet frontage thereon as described in Town Lot Record 8, page 562, of said County, benefit $4.82

Owned by Malinda Bertsch, real estate with 41.25 feet frontage thereon, as described in Town Lot Record 9, page 425, of said County, benefit $4.82

Owned by Heman Jones, real estate with 41.25 feet frontage thereon, as described in Town Lot Record 5, page
18 578, of said County, benefit $4.82

Benefits to Other Property.

Owned by heirs of Henry Luking, to-wit: Mary Luking, Mary Luking, Jr., Josephine Luking, Catherine Luking, William Luking and Francis Luking, real estate with 36 feet frontage thereon, as described in Deed Record 6, page 160, of said County, benefit..... $4.20

Owned by Theodore P. Heineman lot No. six (6), Lot three (3), of Conwell's North Addition to said City, frontage 118 feet, benefit..... $13.78

Owned by John H. Rieman, Lots five (5) and four (4) Block three (3) of Conwell's North Addition to said City, frontage 165 feet, benefit..... $19.25

That said Street as proposed to be opened is simply an extension of Grand Avenue so as to make each meet under the same railroad embankment which tract is particularly described hereinbefore as the land to be appropriated.

Expenses.

We further report that no part of the expense of so opening said Grand Avenue should be paid by the City, except that of the Commissioners herewith reported.

All of which is respectfully submitted this 24th day of March, 1905.

JULIUS C. TURKENKOPH,
WILLIAM H. SHERRY,
WARD JEMISON,
S. O. McKENNAN,
WILLIAM T. EDWARDS,
Commissioners.

Fees:

19 S. O. McKennan..... $6.00
Wm. T. Edwards..... $6.00
Julius C. Turkenkoph..... $8.00
Ward Jemison..... $8.00
Wm. H. Sherry..... $6.00

Filed March 25, 1905.

____ ____,
City Clerk.

Page 266.

Council Adopts Report.

Resolution.

Be it resolved by the Common Council of the City of Connersville that the report of the City Commissioners herein, filed March 25th, 1905 with the City Clerk in the matter of the opening of Grand

Avenue under the railway between 9th and 11th Streets, is hereby accepted, and the following described real estate, as described in said report shall be appropriated for the purpose of opening said Grand Avenue, to-wit: Part of the South east Quarter of Section Twenty-four (24), Township Fourteen (14), Range Twelve (12) in Fayette County, State of Indiana, and described, all that tract of land occupied by the railroad embankment between 9th and 11th Streets in the City of Connersville, that lies between the North and South ends of Grand Avenue as now opened and used and more particularly described as follows: Beginning at the Northeast corner of the end of Grand Avenue, North of 9th, as now opened and used, and at the foot of said railroad embankment, and running thence North with the East line of said Grand Avenue extended a distance of Sixth-six (66) feet more or less to the Southeast corner of said Grand Avenue, as now opened and used on the North of said railroad embankment; thence west along the foot of said embankment and across the South end of said Avenue sixty-six (66) feet more or less to the Southeast corner of said Avenue; thence South with the west line of said Grand Avenue extended sixth-six (66) feet more or less to the Northwest corner of said Grand Avenue as now used and opened South of said Railroad embankment and to the foot of said railroad embankment; thence eastwardly across the North end of said Grand Avenue and with the foot of said railroad embankment sixth-six (66) feet more or less to the place of beginning.

Council Adopts Report.

And the said Clerk is hereby directed to deliver a certified copy of so much of said report as assesses benefits and damages and describes the said real estate so assessed to the Treasurer of this City and said Clerk is directed to copy on the records of this Council said report in full and immediately following the record of the adoption of this resolution.

On motion of Lotz, on call of ayes and nays, the above resolution was adopted.

April 3rd, 1905.

Ry. Co. Files Objections.

The following objection was filed for the railroad Companies interested by their attorney, Reuben Conner:

STATE OF INDIANA:

To the Mayor and Common Council of the City of Connersville, Indiana:

In the Matter of the Proposed Opening of Grand Avenue.

The Cincinnati, Hamilton and Dayton Railway Company, the Cincinnati, Hamilton and Indianapolis Railway Company, and the

Cincinnati, Indianapolis and Western Railway Company, (without in any manner waiving any objections that may be made by them to the proceedings heretofore or hereafter taken in relation to the proposed opening of Grand Avenue in the City of Connersville) take this method of making known to said Common Council the fact that they deny the right to the City of Connersville to impose upon, directly or indirectly, the expense — constructing
21 the necessary opening in the railroad bed, where it is proposed to open said Avenue, or the expense of constructing the necessary Bridge, Viaduct or other structure for the carrying of the railroad over said proposed Avenue, that upon the opening of said Avenue, across or under said railroad, it will become the duties of these companies, or either of them, to construct such opening or such bridge, viaduct, or other structure, then these companies, and each of them, claim that there must be allowed to these companies, (as part of the damage to the real estate abutting on such proposed Avenue due to the opening) the cost of constructing such opening and such bridge, viaduct or other structure, viz: the sum of $10,825, as shown by the following estimate.

Objections of Ry. Co.

Steel 14000# at 4¢ erected	$5600.
Mas. 490 Cu. yds. concrete at $7.50 including forms	3675.
Excavation in bank 2500 cu. yds, at 50¢	1250.
Excavation foundation 300 cu. yds. at $1.00	300.
Total	$10825.

And the proof is hereby offered of the correctness of the estimate aforesaid.

REUBEN CONNER,
Attorney for the Companies Named Above.

Certificate to Council Proceedings.

I, Jacob S. Clouds, City Clerk of the City of Connersville, Indiana, hereby certify that the annexed and foregoing transcript is a full, true and complete transcript of the proceedings of the Common Council of the City of Connersville, requesting and directing
22 meeting of the City Commissioners of said City, in the matter of the opening up of Grand Avenue, to which the annexed and foregoing proceedings relate, the notices given to the Cincinnati, Indianapolis and Western Railway Company, the proceedings and report of City Commissioners, in said maatter and the action of the Common Council on said report, together with all entries and proceedings of said City Commissioners and said Common Council, that appear of record or on file in my office as such City Clerk, together with a copy of transcript of the notice and prayer of appeal on the part of the Cincinnati, Indianapolis and Western Railway Company in said proceedings.

Certificate Concluded.

Witness my name as such City Clerk, and seal of said City, this 23rd day of May, 1905.

[SEAL.]

JACOB S. CLOUDS,
City Clerk of the City of Connersville, Indiana.

STATE OF INDIANA,
Fayette County, ss:

Fayette Circuit Court, December Term, 1905.

No. 5232.

CITY OF CONNERSVILLE
vs.
CINCINNATI, INDIANAPOLIS & WESTERN RAILWAY COMPANY.

Motion for Change of Venue.

Comes now the Cincinnati, Indianapolis & Western Railway Company, defendant in the above entitled cause, by Reuben Conner, its local attorney, and moves the Court for a change of venue of said cause from Fayette County State of Indiana, for the reason that said defendant cannot have a fair and impartial trial of said cause in said county on account of local prejudice existing against the defendant in said County. And in support of this motion the
23 defendant files herewith the affidavit of Emerson Wysong, the General Foreman of said Road.

REUBEN CONNER,
Attorney for Defendant.

STATE OF INDIANA,
Fayette County, ss:

Fayette Circuit Court, December Term, 1905.

No. 5232.

CITY OF CONNERSVILLE
vs.
CINCINNATI, INDIANAPOLIS & WESTERN RAILWAY COMPANY.

24 *Affidavit for Change of Venue.*

Emerson Wyson, being first duly sworn, upon his oath says: That he is the General Foreman of the Cincinnati, Indianapolis & Western Railway Company, the defendant in the above entitled cause; that said Railway Company cannot have a fair and impartial trial of said cause in Fayette County, State of Indiana, on account of local prejudice, in said Fayette County. And further affiant sayeth not.

EMERSON WYSONG.

Subscribed and sworn to before me, this 11th day of January, 1906.

[SEAL.] BERTRAM C. TAMLIN,
Notary Public.

My commission expires March 19th, 1907.

STATE OF INDIANA,
County of Fayette, ss:

Fayette Circuit Court, December Term, 1905.

CITY OF CONNERSVILLE
vs.
CINCINNATI, INDIANAPOLIS & WESTERN RAILWAY COMPANY.

Exceptions of Deft. Ry. Co.

The defendant, the Cincinnati, Indianapolis & Western Railway Company, says that it is the owner of the right-of-way of what is generally known as the Cincinnati, Indianapolis and Western Railway Railroad, of which the land or real estate appropriated for a street, in the proceedings had and taken by the City Commissioners of the City of Connersville, Indiana and the Common Council of said City, in which this appeal is taken, forms a part, and that the land so attempted to be appropriated in these proceedings for street purposes is a part of this exceptor's right-of-way, and said Railway Company objects to the report of said City Commissioners in said matter, in which said City Commissioners assess damages and benefits, and to the action of the Common Council of said City, in adopting approving and confirming said report, for the following reasons, viz:

First. That the damages assessed on account of the appropriation of this exceptor's said land for said street purposes, are too small; that this exceptors will, by reason of the appropriation of its said part of its said right-of-way, sustain damages in the sum of Twelve Thousand Dollars ($12,000.00).

Exceptions Ry. Co.

Second. Because the damages assessed on account of the value of its said land, appropriated for street purposes, are too small.

Third. Because this exceptor did have at the time said appropriation proceedings was commenced, has had ever since, and has now, valu-ble and lasting improvements, situated upon the real estate appropriated, that will be destroyed and become worthless by the construction of said street, to this exceptor's damage in the sum of $12,000.00; that said City Commissioners did not, nor did said Common Council, assess any damages in favor of this exceptor, nor any one else, on account of the destruction and the appropriation of said improvements.

Fourth. Because the construction of said road will sever this exceptor's right-of-way in such a manner that it will damage the remainder of its said right-of-way in a large amount, to-wit, the sum

of $12,000.00, and that said City Commissioners did not, nor did said City Council, assess any amount in favor of this exceptor, or any one else, on account of said damages to the remainder of its said right-of-way.

REUBEN CONNER,
Attorney for Defendant & Exceptor.

26 Be it remembered that afterwards, to-wit, on the 25th day of April, 1906, the same being the 21st Judicial Day of the April Term, 1906, the following further proceedings were had in the above entitled cause, before the Honorable John M. Morris sole Judge of said Court in and for said County and State aforesaid:

No. 1342.

CITY OF CONNERSVILLE
vs.
CINCINNATI, INDIANAPOLIS & WESTERN RAILWAY COMPANY.

Appeal.

Comes now the parties by their counsel as aforesaid and thereupon the plaintiff files her demurrer to each specification of the answer herein in these words, to-wit:

STATE OF INDIANA,
Henry County, ss:

Henry Circuit Court, April Term, 1906.

No. 1342. Appeal.

CITY OF CONNERSVILLE
vs.
CINCINNATI, INDIANAPOLIS & WESTERN RAILWAY COMPANY.

Pl'ff's Demurrer to Exceptions.

The plaintiff in the above entitled cause demurs to the answer of the defendant therein for the following grounds of objection:

1. Said answer does not state facts sufficient to constitute a cause of defense.

2. Said plaintiff further demurs separately and severally to the First, Second, Third and Fourth specifications of the Defendant's grounds of objection to the proceedings of the Common Counsil and Commissioners, as the same are set up in the answer of said Defendant, for the following grounds of objection:

1. No one of said specifications states facts sufficient to constitute a cause of defense.

D. W. McKEE.
City Attorney, for Plaintiff.

27 Be it remembered that afterwards, to-wit; on the 19th of May, 1906, the same being the 42nd Judicial Day of the April Term, 1906, the following further proceedings were had in the above entitled cause:

No. 1342.

CITY OF CONNERSVILLE
vs.
CINCINNATI, INDIANA- & WESTERN RAILWAY COMPANY.

Appeal.

Demurrer to Exceptions Overruled.

Comes now the parties by their counsel as aforesaid, and thereupon the Court being fully advised in the premises overrules the demurrer to the defendant's answer herein, to which ruling of the Court, the plaintiff objected and excepted at the time. And the Court being fully advised in the premises overrules the demurrer to the first specification of the defendant's answer herein to which ruling of the Court, the plaintiff objected and excepted at the time, and the Court being fully advised in the premises overrules the demurrer to the second specification of the defendant's answer herein, to which ruling of the Court the plaintiff objected and excepted at the time, and the Court being fully advised in the premises overrules the demurrer to the third specification of the defendant's answer herein to which ruling of the Court the plaintiff objected and excepted at the time, and the Court now being fully advised in the premises sustains the plaintiff's demurrer to the fourth specification of the defendant's answer herein, to which ruling of the Court the defendant objected and excepted at the time.

Demurrer to 4th Ex. Sustained.

Be it remembered that afterwards, to-wit, on the 15th day November, 1906, the same being the 40th Judicial Day of the October Term, 1906, the following further proceedings were had in the above entitled cause:

28 No. 1342.

CITY OF CONNERSVILLE
vs.
CINCINNATI, INDIANAPOLIS & WESTERN RAILWAY COMPANY.

Appeal.

Comes now the parties by their counsel as aforesaid and thereupon the defendant files its fifth specification of exception herein in these words, to-wit:

STATE OF INDIANA,
Henry County:

Henry Circuit Court, October Term, 1906.

No. 1342.

CITY OF CONNERSVILLE
VS.
CINCINNATI, INDIANAPOLIS & WESTERN RAILWAY COMPANY.

Def't Files 5th Exception.

Fifth Paragraph of Exceptions.

Comes now the Cincinnati, Indianapolis & Western Railway Company the defendant in said cause by its attorneys and for further and fifth paragraph of exceptions and objections to the report of the City Commissioners in said matter says:

That in the year 1848 the grantor of this defendant acquired the right of way in fee simple over and across the lands over which it is proposed to open — establish the street as named in the proceedings herein under and pursuant to a special charter of the legislature of the State of Indiana granting to said grantor the full right to acquire said right of way in fee simple. That it immediately took possession of said right of way and constructed over the same a railroad extending from the City of Cincinnati in the State of Ohio by the way of the City of Hamilton to the City of Indianapolis in the State of Indiana and that said railroad has been constantly and continuously operated from that time to the present time. That at the time said right of way was acquired and said railroad built the lands over which it extended and over which it is proposed to open, locate and establish said street was an open field not within the limits of the town now City of Connersville and was in no wise subject to the jurisdiction of said town.

29 That said company in constructing its road over and across the point where said street is proposed to be located constructed an embankment of earth 66 feet wide at the bottom and 22 feet high with a slope approximately of 45 degrees at each side. That said embankment was constructed of solid earth and has been maintained as such and is now a firm and solid earthen embankment. That upon said embankment the said company laid and constructed a single track railroad which has been operated from that time until the present time.

That the defendant acquired said right of way and roadbed and said railroad by *mean* conveyances from said remote grantor on the — day of —— 18— and that the defendant is now operating over said point and over said railroad a continuous line of railroad from the City of Cincinnati in the State of Ohio to the City of Indianapolis in the State of Indiana and thence by track arrangement with

Def't's 5th Exception.

connecting lines — operates the same as a through line from the City of Cincinnati aforesaid to the City of Chicago, Illinois and to the City of Decatur Illinois. That this defendant at the time of the commencement of this proceeding operated and yet operates at least six passenger trains each way between the points aforesaid and a large amount of freight and other trains essential to carry on the traffic of said Company over and upon said railroad. That the ground proposed to be occupied by said street and earthen embankment aforesaid which it will be necessary to remove and carry away in order to enable said street to be opened over and upon said right of way and the construction of necessary abutements and bridging over said proposed street will cost said Company the sum at least, of $12,000 and the embankment and right of way proposed to be taken for said street is of the value of $5,000. That in order to open and construct said street it will be necessary to cut and
30 carry away said embankment within the line thereof and to take waste and destroy the property of the defendant on and to said embankment and the earth and material constituting the same and will leave the track and the ties of said Company unsupported so that it will be necessary to take and carry them away in the construction of said street and leave so much of the track of said Company to be bridged by a steel or metal bridge spanning the same. That for more than 15 years after said road was built and constructed at the point aforesaid *and* lying north thereof remained open agricultural lands used and adapted to no other than agricultural purposes. That about said time the lands north of the plaintiff's said railroad which run- substantially east and west at the point aforesaid were platted and laid out as an addition or additions to the then town of Connersville and that the same was thereafter incorporated within the limits of said town and now constitute a part of the corporate territory of the said City of Connersville. That one square east of the point where it is proposed to open said street through said right of way there is a public well improved street of said City extending north and south through said City and the lands platted on the north thereof with an under grade crossing. That one square west of the point aforesaid there is another well improved street of said City extending north and south through the same and through said platted territory at the north upon an under grade crossing. That said street proposed to be open and established across said right of way extends from the north side of said right of way through said platted lands on the north and from the south side of said right of way through that portion of the City of Connersville lying south of said railroad. That between the squares both north and south of said railroad there are well improved cross streets leading from said streets running north and south as aforesaid to the parallel streets
31 running north and south as above stated. That in the territory lying north of the defendant's railroad there resides approximately 2000 inhabitants. That the main part of said City and especially the business part thereof lying south of said rail-

Def't's 5th Exception.

road has a population of 6000 to 7000. That the total population of said City is from 8000 to 9000 people. That the two streets above named furnish at all times an ample way of travel between said parts of said City and to the inhabitants of said City and all other persons having occasion to pass from one part of said City to another and that at no time is there now or has there been any congested condition of travel upon either of said streets and they furnish ample accom-odation for *for* all people having occasion to cross said railroad in going either way. That said embankment in its present condition forms a solid and permanent roadbed requiring but little expense to maintain the same. That if said embankment is cut and carried away and a bridge is constructed over said proposed street that the expense of maintaining the same will be very largely increased over and above the maintaining of said embankment and the tracks thereon to-wit in the sum of $500 per year. That the location opening and establishment of said street will necessarily take the property of the defendant aforesaid of the value aforesaid and will damage said right of way in the *in the* several amounts aforesaid all of the value and to the extent of the full sum of $14,000. That said City Commissioners did not take into consideration nor did said Common Council assess any amount in favor of this exceptor or any one else on account of the property taken as aforesaid or any part thereof or on account of the damages to the right of way as above alleged incident to the locating opening and establishment of said street and that to locate and establish said street without taking the same into consideration and awarding damages thereof will be to take the property and rights of this defendant without due compensation.

Def't's 5th Exception.

32

Wherefore the defendant demands judgment that said report be set aside and that *they* recover of said city the full amount of the damages aforesaid to-wit, the sum of $14,000.

REUBEN CONNER,
FORKNER AND FORKNER,
For Defendant.

And thereupon the said plaintiff files its demurrer to said fifth paragraph of said exception herein in these words, to-wit:

STATE OF INDIANA,
County of Henry:

Henry Circuit Court, October Term, 1906.

No. 1342.

CITY OF CONNERSVILLE
vs.
CINCINNATI, INDIANAPOLIS & WESTERN RAILWAY COMPANY.

Pl'ff's Demurrer to 5th Ex.

The plaintiff in the above entitled cause demurs to the fifth paragraph of exceptions, filed by the defendant, in said cause for the following grounds of objection:

One: Said fifth paragraph of exceptions, does not state facts sufficient, to constitute a defense.

Two: Said fifth paragraph of exceptions does not state facts sufficient to constitute a cause of action.

R. N. ELLIOTT, *City Attorney;*
D. W. McKEE,
BARNARD AND JEFFREY,
Att'ys for Pla-ntiff.

Demurrer to 5th Ex. Overruled.

Which is submitted to and overruled by the Court, to which ruling of the Court the pla-ntiff objected and excepted at the time. Thereupon the pla-ntiff files its reply in general denial to the first, second, third and fifth paragraphs of exceptions herein in these words, to-wit: (here insert).

33 And thereupon the pla-ntiff files its second paragraph of reply to the first, second, third and fifth paragraphs of exceptions herein in these words, to-wit: (here insert), and thereupon the said pla-ntiff files its third paragraph of reply to the first and third specifications herein in these words, to-wit: (here insert) which said several paragraphs are in the following words and figures, to-wit:

STATE OF INDIANA,
Henry County, ss:

Henry Circuit Court, September Term, 1906.

CITY OF CONNERSVILLE
vs.
CINCINNATI, INDIANAPOLIS & WESTERN RAILWAY COMPANY.

Pl'ff's Reply to Exceptions Except the 4th.

1st Paragraph:

The City of Connersville, the pla-ntiff in the above entitled cause, for reply to the 1st, 2nd, 3rd and 5th specifications of said defendant's objections to the report of City Commissioners and to the action of the Common Council of said city in approving said report, denies each and every material allegation in said specifications contained.

2 *Par. of Reply.*

2nd Paragraph:

And said Pla-ntiff, the City of Connersville, for a second and further reply to the 1st and 3rd specifications of grounds of objection to the proceedings of the City Commissioners and the Common Council of said City in this cause, says that at the point where it is proposed to open up said Grand Avenue, and where the same has been ordered to be opened up in this cause, the Defendant, said

Cincinnati, Indianapolis & Western Railway Company, has but a single track of railroad and no improvements whatever on said ground, except as its single line of railway and the embankment upon which the same is constructed, and that no other or different
34 improvements of said Railway across said Grand Avenue at the point where the same has been ordered to be opened up for the purpose of a street.

3 Par. of Reply.

3rd Paragraph:

And said City of Connersville, the plaintiff herein, for a third and partial reply to the 1st and 3rd specification- of the exceptor's specifications of objections to the report of the City Commissioners and the action of the Common Council of said City in said cause, says, by way of reply to the 1st and 3rd of said specifications, except in-so-far as the value of Real Estate over which said Grand Avenue is ordered to be opened up that at the point where -t proposed to open up said Grand Avenue, and where the same has been ordered opened up in this cause the Defendant, said Cincinnati, Indianapolis & Western Railway Company, has put a single track of railroad, and no improvements whatever on said ground, except its single line of railway, and the embankment upon which the same is constructed, and that no other or different improvements of said Railway across said Grand Avenue at the point where the same has been ordered to be opened up for the purpose of a street.

Wherefore said plaintiffs demands judgment for cost and all other proper relief.

R. N. ELLIOTT, *City Attorney.*
D. W. McKEE,
BARNARD AND JEFFREY,
Attorneys for Plaintiff.

Def't Given Open & Close.

And thereupon the said defendant orally moves to the Court to open and close the cause, which said motion is sustained by the Court, to which ruling of the Court in permitting said defendant to open and close said cause, the plaintiff objected and excepted at the time, and the pla-ntiff is given sixty days in which to prepare and file all bills of exceptions on said ruling.

35 *Jury.*

And thereupon the issues in said cause being joined the same for trial are submitted to the following jury, to-wit: John W. Fadely, John Draper, Nelson Gross, George Ocker, Oscar Fleming, Jabe Bowman, Oscar Wood, Greenberry Hedges, William D. Pierce, Ed Modlin, David Wrightsman and Clint Hess, twelve good and lawful men who are resident householders or freeholders of Henry

County, Indiana, and qualified voters therein who are each severally impaneled charged and sworn to well and truly try the issues joined in said cause, and said jury having heard a part of the *ve*idence in said cause are permitted under the charge of the Court to separate until tomorrow morning at 8:30 o'clock.

Be it remembered that afterwards to-wit: the following further proceedings were had in the above entitled cause, before the Hon*orbal*e John M. Norris, sole Judge of said Court, in and for the County of Henry, State of Indiana, and were made of record as follows:

No. 1342.

CITY OF CONNERSVILLE
vs.
CINCINNATI, INDIANAPOLIS & WESTERN RAILWAY COMPANY.

Appeal.

Jury Retire.

Comes now the parties by their counsel as aforesaid, and comes also the Jury heretofore impaneled in this cause, and said jury having heard the argument of counsel, and the instructions of the Court, retire to their room in charge of a sworn officer of this Court to deliberate of a verdict, and thereupon the said plaintiff having heretofore filed its request to instruct the jury in writing and to give to the jury certain instructions so prepared by it which said request and said instructions are in these words, to-wit:

36 *Pl'ff's Request for Instructions.*

STATE OF INDIANA,
County of Henry:

Henry Circuit Court, October Term, 1906.

No. —.

CITY OF CONNERSVILLE
vs.
CINCINNATI, INDIANAPOLIS & WESTERN RAILWAY COMPANY.

Pl'ff's Instructions.

The plaintiff in the above entitled cause asks the Court to instruct the jury trying the same, only in writing, and request- said Court to give to said jury each of the following instructions, which of said instructions will be given.

I. The Court instructs you to find for the plaintiff.

II. The Court instructs you that when a Rail-way crosses a public Highway the law casts upon the Company, owning said *said* Railway the burden of building and maintaining a suitable crossing for said highway, and said Railway company is not entitled to be reimbursed for the expense of making such crossing and this is the law, even if such highway is laid out after such Railway is constructed and in operation.

III. It is the duty of a Railway Company, without compensation to provide a convenient and safe crossing, where highways or streets intersect its railroad, and this without regard to whether said highway is, on, below or above the grade of such Railroad.

IV. If you find from the evidence that the defendant is the owner of the line of Railroad across which Grand Avenue is proposed to be opened up and if you further find that said railroad is on an embankment and that the same when constructed was outside of th*t* th*em* town or City of Connersville and that the same is now within the limits of said City in such case whenever the convenience of the people of said City required that said avenue should be opened up, in order to make said avenue continuous, through said embankment, the law casts the burden of making a suitable and safe crossing for said street, upon the defendant, and for so
37 doing it would be entitled to no compensation, by way of damages.

RICHARD N. ELLIOTT,
D. W. McKEE,
BARNARD AND JEFFREY.

Pl'ff's Instructions. Refused. Excep.

Which said instructions the said Court refused to give, and refus- to give either of said instructions, to which refusal of the Court in refusing to give said instructions or either one thereof the plaintiff objected and excepted, and thereupon the defendant also having filed its request to instruct the jury in writing and to give to the jury certain instructions and which said request and said instruction- so prepared by said defendant are in these words, to-wit:

38 STATE OF INDIANA,
Henry County, ss:

Henry Circuit Court, October Term, 1906.

No. 1342.

CITY OF CONNERSVILLE
vs.
CINCINNATI, INDIANAPOLIS & WESTERN RAILWAY COMPANY.

Def't's Request for Instructions.

The Cincinnati, Indianapolis & Western Railway Company the defendant in the above entitled cause before the beginning of the

argument therein requests the Court to give to the jury each of the following instructions that is to say:

1. If under the evidence in this cause and the law applicable thereto as given you by the Court you should find that the defendant Railway Company is entitled to any damages then in determining the amount of such damages you should consider the character of the property, if any, belonging to the defendant appropriated for the proposed street, and the use to which said property has been and is devoted by the defendant, its fitness or unfitness for such use, and award such damages as will fairly compensate the defendant for such property.

Def't's Instructions.

2. If property is taken for public use that has a peculiar value to the owner on account of its being devoted and adapted to a particular use then such owner should be compensated for its taking by assessing his damages at such value.

(Ohio Valley & Co. vs. Keith, 130 Ind. 314.)

(4 Sutherland Damages Sec 1074.)

3. When property is taken for public use that by its situation or its relation to other property of the owner, or its fitness for use in connection with and as a part of one entire piece of property owned by the same owner, has a peculiar value and such value is shown then it becomes the basis for assessing damages; that this is true even though it has a less general market value. An
39 owner so situated is not entitled to fanciful or sentimental damages but he is entitled to such damages as will fairly compensate him for the loss he sustains in having his property appropriated for the public use even though it might be worth less or even nothing at all to any other Person.

Def't's Instructions.

4. Applying these rules to the case on trial the Court instructs you that in determining the amount of the defendant's damages, if you should find it entitled to any, you should consider the value of any of its property taken as used in connection with its line of railroad and as a structural part thereof and for the use to which it is devoted by the defendant and for which is or its predecessors in interest have fitted it.

5. When a street is opened through the right of way of a railroad company, such company is not limited, when seeking compensation, to damages for the use of the land occupied by the street but the damages awarded should include any extra expense that necessarily and proximately results from such opening in making structural changes in the property of the railroad company in order that it may be operated as a railroad, but expenses made necessary for the sole purpose of complying with the police regulations of the state or city should not be included. (City vs. Grand Rapids (Mich.) 33 N. W. 15.)

6. If the appropriation of the defendant's property under the proceeding set forth in this case will necessarily and proximately cause expense to the defendant in constructing a bridge to carry its railroad over the proposed street in order that its railroad tracks may have support and its railroad may be operated as such, and as an entire line, and such construction of said bridge will be required for no other purpose then, in determining the defendant's damages you should consider the expense of constructing such bridge.

40 *Def't's Instructions.*

7. If you find from the evidence that the establishment and opening of the street in question will necessarily take a certain portion of the defendant's right of way and necessitate the removal of an embankment thereon (if any) constituting a part of the defendant's road bed, the defendant would be entitled to recover the reasonable value of said land so taken, if any, and the embankment thereon (if any) and in determining the value thereof you should consider their value for the uses to which they are adapted and for which they are used and fix their value for the uses and purpose to which they are adapted and for which they are used.

8. If the defendant's railroad as constructed and used without the proposed street being opened is and may be operated at the point where it is proposed to open said street and would be equally so if carried across the street upon an overhead bridge but such operation would be no more safe for the public after such change than before then such change would not be made in compliance with or on account of any police regulation but would be a structural change for which damages should be allowed in this action.

9. Where a street is opened and established across a railroad right of way already constructed not in the line or location of any pre-existing street or highway, the railroad is not entitled to recover as damages for anything required of it under the police regulation such as providing necessary planking, cattle guards, wing fences, gates signals and the like, but it would be entitled to compensation for the value of any lands actually taken, embankments necessarily destroyed and carried away, and the necessary costs of restoring its right of way to its original usefulness.

FORKNER & FORKNER,
REUBEN CONNER AND
ELAM & FESLER,
Att'ys for Defendant.

41 *Def't's Instructions Refused and Court Instructs.*

But the Court refused to give said instructions or to give either of said instructions to which refusal of the Court to give said instructions or either of them the said defendant objected and excepted at the time. And thereupon the Court gave of its own motion his instruction in writing, which said instructions are numbered from one to sixteen both inclusive, and are as follows, to-wit:

42 No. 1342.

CITY OF CONNERSVILLE
vs.
CINCINNATI, INDIANAPOLIS & WESTERN RAILWAY COMPANY.

Court's Instructions.

1.

Gentlemen of the Jury: This is a proceeding instituted by the City of Connersville against the defendant to open a street known as Grand Avenue in the City of Connersville, Indiana, over and across the defendant's railroad and right of way. The transcript which will be treated *as* by the Court as the plaintiff's complaint in this action, contains and states the following facts: That on the 5th day of September, 1904, the City of Connersville adopted a resolution as follows:

Whereas, the railroad embankment which crosses Grand Avenue in the City of Connersville, between Ninth and Eleventh Streets, obstructs the passage between the north and South ends of such street, and whereas it is by many considered and believed to be a matter of public necessity that said Grand Avenue be opened up as a public street through said embankment, now therefore be it resolved by the Common Council of said City that the expedience of referring the matter of opening up said street through said railroad embankment to the City Commissioners of said City be and the same is hereby referred to the Committee on Streets, alleys and bridges of said City, and said Committee is hereby directed to make its report at the next regular meeting of this Common Council. That on September 19, 1904, the Committee on Streets, alleys and bridges reported as follows:

The undersigned hereby report that they deem it expedient to refer the opening of Grand Avenue through the Cincinnati, Indianapolis & Western Railroad to the City Commissioners, which report was signed by the —— ——.

43 That on the 19th day of September, 1904, it was unanimously resolved by the Common Council of the City of Connersville that the question of the advisability and public utility of opening up said Grand Avenue through the railroad embankment as aforesaid, be and the same was referred to the City Commissioners of said City, and said City Commissioners were directed to meet at the Council Chamber in said City on October 6th, 1904, at nine o'clock in the forenoon and report to the Council, and the Clerk was directed to notify said Commissioners of this reference and of the time and place of their meeting. That thereafter on February 6, 1905, the said Committee reported that the opening of said avenue through said railroad embankment would be of public utility, and

Court's Instructions.

that the real estate to be appropriated by the opening of said Grand Avenue is so much of said railroad embankment as extends the entire width of said Grand Avenue as now used and opened, immediately north and immediately south of said railroad embankment, and being sixty-six feet in width, and of the length of about sixty-six feet.

The tract to be appropriated being a tract of ground sixty-six feet square and occupied by said railroad embankment. That the owner of said real estate sought to be appropriated, is the Cincinnati, Indianapolis & Western Railroad Company, and that afterwards, on the 17th day of April, 1905 said City Commissioners reported that the property of said defendant so proposed to be appropriated is of the value of one hundred and fifty dollars. That upon the filing of said report, it was resolved by the Common Council of said City of Connersville, that the report of said Commissioners, as aforesaid, is hereby accepted, and that the real estate above described should be appropriated for the purpose of opening said Grand Avenue.

44 From these proceedings the defendant appealed to the Circuit Court of Fayette County, Indiana, and in that Court filed its exceptions in four paragraphs, in which it alleges, in substance, that it is the owner of the right of way of what is generally known as the Cincinnati, Indianapolis and Western Railroad, of which the land and real estate appropriated for a street, in the proceedings had and taken by the City Commissioners of the City of Connersville, and the Common Council of said City, and that the lands so attempted to be appropriated in these proceedings for street purposes is a part of this exceptor's right of way and said railway company objects to the report of said city Commissioners in said matter, in which said City Commissioners assesses damages and benefits, and to the action of the Common Council of said city in adopting, approving and confirming said report, for the following reasons named: First: That the damages assessed on account of the appropriation of this exceptor's said land for said street purposes are too small, that this exceptor will by reason of the appropriation of its said part of its said right of way, sustain damages in the sum of twelve thousand dollars; second, because the damages assessed on account of the value of said land appropriated for street purposes are too small; third, because this exceptor did have, at the time said appropriation proceedings were commenced, has had ever since, and has now, valuable and lasting improvements situated upon the real estate appropriated that will be destroyed and become worthless by the construction of said street to this exceptor's damage in the sum of twelve thousand dollars, and that City Commissioners did not, nor did said Common Council, assess any damages in favor of this exceptor nor any one else on account of the destruction and the appropriation of

45 said improvements. To the fourth specification of exception, the Court has sustained a demurrer and that specification is not before you for your consideration.

Court's Instructions.

3.

In this Court the defendant has filed a fifth specification of exceptions and objections to the report of City Commissioners in said matter in which it alleges in substance, that in the year 1848 the grantor of this defendant acquired the right of way in fee simple over and across the land which it is proposed to open and establish a street as named and described in the proceedings herein, under and pursuant to a special charter of the State of Indiana, granted the said grantor the full right to acquire said right of way in fee simple. That it immediately took possession of said right of way and constructed over the same a railroad extending from the City of Cincinnati, Ohio, to the City of Indianapolis, Indiana and that said railroad has been constantly and continuously operated from that time to the present time. That at the time said right of way was acquired, and said railroad was built, the land over which it extended and over which it is proposed to open, locate and establish said street was open field, not within the limits of the then town now city of Connersville, and was in no wise subject to the jurisdiction of said town. That said company, in constructing its road over and across the point where said street is proposed to be located, constructed an embankment of earth sixty-six feet wide at the bottom and twenty-two feet high, with a slope of approximately forty-five degrees at each side. That said embankment was constructed of solid earth, and has been maintained as such, and is now a solid earthen embankment. That upon said embankment the said company laid and constructed a single track railroad, which has been operated from that time until the present time. That the ground proposed to be occupied by said street and the earthen embankment aforesaid, which it will be necessary to remove and carry away, in order to enable said street to be opened over and upon said right of way, and the construction of necessary abutements and bridges over said proposed street will cost said company the sum of twelve thousand dollars, and the embankment and right of way proposed to be taken for said street is of the value of five thousand dollars. That for more than fifteen years after said road was built and constructed the ground through which it was constructed at the time aforesaid and lying north thereof remained open agricultural land used and adapted to no other than agricultural purposes. That one square east of the point where it is proposed to open said street through said right of way there is a public street of said city, and the land platted on the north thereof with an under grade crossing That one square west there is another well improved street of said city, through said platted territory to the north upon an under grade crossing. That the two streets above named furnish at all times an ample way of travel to the inhabitants of said city and all other persons having occasion to pass from one part of said city to another. That the location, opening and establishment of said street will take the property of the defendant aforesaid of the value aforesaid, all of the value and to the extent of the sum of fourteen thousand dollars; wherefore the defendant

Court's Instructions.

46

Court's Instructions.

demands judgment that said report of said Commissioners be set aside, and that they recover of said city the full amount of the damages aforesaid, to-wit, the sum of fourteen thousand dollars.

4.

To the first, second, third and fifth specifications of the defendant's exceptions to the report of the City Commissioners, the
47 plaintiff has filed its reply in general denial; the second paragraph of reply alleges in substance, that, at the point where it is proposed to open up said Grand Avenue, the defendant has but a single track of railroad and no improvements whatever upon said ground except its single line of railway, and the embankment upon which the same is constructed, and that no other or different improvements of said railway are across said Grand Avenue at the point where the same has been ordered to be opened up for the purposes of a street; and the third paragraph alleges in substance the same facts as are contained in the second paragraph.

5.

Court's Instructions. Under the issues thus formed, the only question for your consideration in this case is the amount of damages, if any that should be allowed to the defendant.

6.

The burden rests upon the defendant to prove all of the material averments of one or more of its exceptions by a fair preponderance of all the evidence given in the cause.

7.

The burden rests upon the plaintiff to prove, by a fair preponderance of all the evidence given in the cause, all of the material averments of one or both of its second or third paragraphs of reply.

8.

The City of Connersville has the right to open the street known as Grand Avenue over and through defendant's right of way: as has been done by the proceedings in this case; it also has the right to cause buildings, structures, or other things in the way of opening said street to be taken down, removed and appropriated upon the
48 payment of damages, as provided by law.

9.

Under the statutes of this state it is the duty of all railroad companies to construct and keep in safe and good condition all highway crossings, and this duty is the same whether the highway was established before or after the railroad was built.

10.

Court's Instructions.

The law also requires a railroad company to keep its railroad and right of way in a reasonably safe condition for the transportation of passengers and freight, and therefore in the opening of the street proposed, the excavation and removal of the embankment through which the proposed street will pass, and the expense thereof, will be imposed upon the railroad Company.

11.

If, under the evidence in this cause, and the law applicable thereto as given to you by the Court, you should find that the defendant railroad company is entitled to any damages then, in determining the amount of such damages, you should take into consideration the value of any land of the defendant actually taken and appropriated, if any, the value of the embankment necessarily taken, if any, and the cost of the removal of embankment, if any, as shown by a fair preponderance of the evidence and the sum of these items would constitute the full measure of defendant's damages.

12.

It being the duty of the defendant railroad company to construct and keep in safe and good condition all highway crossings, the defendant in this action would not be entitled to any damages for constructing the necessary crossing nor abutements and bridge for supporting its railroad over and across said street when constructed.

49

12½.

You are the exclusive judges of the evidence and of its weight and of the credibility of the witnesses. It is your duty to consider all the evidence given in the cause, and therefrom determine what facts have been proven or not proven.

13.

It is your duty to take the law to be as stated by the Court in these instructions.

14.

Court's Instructions.

If you find for the defendant, the form of your verdict will be: "We the jury find for the defendant, The Cincinnati, Indianapolis and Western Railway Company, and assess its damages at (here state the amount)."

15.

If you find that the defendant is not entitled to any damages whatever, the form of your verdict will be: "We, the jury, find for the plaintiff."

16.

Appoint one of your number foreman of the jury. It will be his duty to sign your verdict for you as foreman, and when you agree

upon a verdict and cause the same to be signed by your foreman, return the same into open Court.

JOHN M. MORRIS,
Judge Henry Circuit Court.

50 *Def't's Exception to Instructions.*

To which giving of said instructions to the jury of the Court's own motion the said defendant objected and excepted at the time.

Instructions Part of Record.

It is therefore ordered by the Court that each and all of the instructions as asked by the plaintiff and the defendant and so refused by the Court, and those so given by the Court of its own motion be and they are hereby ordered filed by the Clerk of this Court and made a part of the record in said cause, and which are now filed at the close of the giving of said instructions of the Court to the jury, and said jury after some time return the following verdict, to-wit:

Verdict.

"We, the jury, find for the defendant, The Cincinnati, Indianapolis and Western Railroad Company and assess its damages at Eight Hundred Dollars, ($800.00).

G. W. HEDGES,
Foreman of the Jury."

Be it remembered that afterwards, to-wit, on the 24th day of November, 1906, the same being the 48th Judicial Day of *of* the October Term of the Henry Circuit Court in and for said County and State aforesaid, the following further proceedings were had in the above entitled cause before the Honorable John M. Morris, sole Judge of said Court:

No. 1342.

CITY OF CONNERSVILLE
vs.
CINCINNATI, INDIANAPOLIS & WESTERN RAILROAD COMPANY.

Appeal.

Def't Files Motion for New Trial.

Comes now the parties by their counsel as aforesaid, and thereupon the defendant files its motion for a new trial herein in these words, to-wit:

STATE OF INDIANA,
Henry County, ss:

Motion for a New Trial.

Henry Circuit Court, October Term, 1906.

No. 1342.

CITY OF CONNERSVILLE
vs.
CINCINNATI, INDIANAPOLIS AND WESTERN RAILWAY COMPANY.

51 *Def't's Motion for New Trial.*

The defendant in the above entitled cause moves the Court to set aside the verdict therein and to grant it a new trial for the following causes, to-wit:

1. The verdict of the jury is not sustained by sufficient evidence.
2. The verdict of the jury is contrary to law.
3. For error of law occurring at the trial and excepted to by the plaintiff at the time in this:

(*a*) The Court erred in giving to the jury of its own motion Instructions numbered 1-2-3-4-5-6-7-8-9-10-11-12-12½-13-14-15- & 16- and in giving each one thereof separately and severally.

(*b*) The Court erred in refusing to give to the Jury Instructions numbered 1-2-3-4-5-6-7-8- & 9 of the Instructions asked by the defendant and refusing to give each one thereof separately and severally.

(*c*) The Court erred in each of the several rulings here following, to-wit: 1-2-3-4-5-6-7-8-9-10-11- & 12.

STATE OF INDIANA,
County of Henry:

In the Henry Circuit Court, October Term, 1906.

No. 1342.

CITY OF CONNERSVILLE
vs.
CINCINNATI, INDIANAPOLIS & WESTERN RAILROAD COMPANY.

Exceptions Reserved by the Defendant.

1.

Examination in chief of C. S. SHEILDON, a witness called on behalf of the defendant, testifying under oath:

Questions by Judge FORKNER:

52 Q. State what it would be worth to construct that embankment there as it is now per cubic yard.

To which question the plaintiff objected, upon the ground that the question calls for evidence touching a question in no way involved in the issues in the cause.

Thereupon the defendant proposed to prove by the witness that to construct the embankment alone, disconnected from other considerations, that it would be worth from sixty to seventy-five cents per cubic yard, and the defendant offers to prove this as an element, a distinct element, going to the question of the value of the material that is to be taken away from the defendant in this case.

The Court sustained such objection. To which ruling of the Court the defendant excepted at the time.

Def't's Motion for New Trial.

2.

On cross-examination of C. S. SHELDON, witness for the defendant:

Questions by Mr. MCKEE:

Q. Now, do you know, by teams, without the use of steam shovels nor railways, do you know what it costs to excavate a cubic yard of earth in Connersville?

To which question the defendant objected on the ground that counsel now is proving what it would take to carry dirt to this place but declines to ask the witness what it is worth on the embankment or what it would cost to cut and haul it away. The Court overruled such objection. To which ruling of the Court the defendant excepted at the time.

A. No, I do not.

53 *Def't's Motion for New Trial.*

3.

Cross-examination of J. W. STEARNS, a witness called on behalf of the defendant, testifying under oath:

Questions by Mr. MCGHEE:

Q. At sixty-six feet for fourteen thousand dollars, fourteen thousand dollars for sixty-six feet, what would a mile of that railroad be worth?

To which question the defendant objected, upon the ground that that is a matter of calculation. The Court overruled such objection. To which ruling of the Court the defendant excepted at the time.

A. Five thousand two hundred and eighty divided by sixty six——

Q. How?

A. Divide five thousand two hundred and eighty by sixty-six and multiply the fourteen thousand dollars by the resulting figures.

Q. You have not computed it?
A. No sir.
Q. What do you think, two or three million dollars?
A. No sir.
Q. Do you not think it would?
A. No sir.
Q. You are a mathematician, I believe?
A. I think so.
Q. Tell us what a mile of that railroad would be worth.

To which question the defendant objected upon the ground that counsel on cross examination has asked the witness how the calculation should be made and the witness has testified, and that he has no right to require the witness upon the stand to make figures
54 for him; and the defendant objects to the question upon the further ground that the evidence is only in the nature of an argument, and that the figuring can be made by any gentleman who has ever been educated to the Simple Rule of Three; and the defendant objects to the question further upon the ground that it assumes that the railroad through Connersville is all an embankment just like that is. The Court overruled such objection. To which ruling of the Court the defendant excepted at the time.

A. One million, one hundred and twenty thousand.

Def't's Motion for New Trial.

4.

Cross-examination of J. W. STEARNS, a witness called on behalf of the defendant, testifying under oath:

Questions by Mr. MCGHEE:

Q. Have you any knowledge at all as to how close to this place earth for filling purposes can be conveniently obtained?
A. There are places, probably within——

Thereupon the defendant objected to the question and moved the Court to strike out the answer of the witness, upon the ground that it is not proper cross examination; and upon the further ground that there is no pretense of anybody desiring, intending or purposing to haul dirt from any other place to this grade, hence an inquiry as to what it would cost to haul dirt to this grade or this point is wholly immaterial and not proper.
But the Court overruled such objection.
To which ruling of the Court the defendant excepted at the time.

A. There are places within two thousand feet where ma-
55 terial can be gotten to make a fill, to be handled by work trains.

5.

Re-direct examination of J. W. STEARNS, a witness called on behalf of the defendant, testifying under oath:

Questions by Judge FORKNER:

Q. Now, state to the jury the relative value of an embankment of the size of this, that has been made and settled for say twenty-five years, and one newly made, not in dollars and cents, but can you give the proportion.

To which question the pla-ntiff objected upon the ground that such information can in no wise throw any light upon the issues in this case and is immaterial.

Thereupon the defendant offered to prove by the witness in answer to the question, that an embankment of this character after it is made and has settled for a period of twenty to twenty-five years and has become thoroughly settled and the road ballasted, it would be at least double the value of an embankment newly built.

The Court sustained such objection. To which ruling of the Court the defendant excepted at the time.

Def't's Motion for New Trial.

6.

Examination-in-chief of RICHARD N. ELLIOTT, a witness called on behalf of the defendant, testifying under oath:

Questions by Mr. CONNER:

Q. State, if you know, Mr. Elliott, how many trains are now or have been for the last year operated, that is, how many passenger trains each way over the road in question or the railroad in question, through the City of Connersville.

56 To which question the pla-ntiff objected, upon the ground that it was wholly immaterial to any of the issues in this case. The defendant railroad company, it is owns the railway or operates it, and known as a party interested in this cause, is subject to the law, and the law is the same whether there be many or few trains, and the evidence can show light on the questions at issue, or the measure of damages.

Thereupon the defendant offered to prove in answer to the question put to the witness upon the stand, that there has been, during the past year, six passenger trains, passing over this part of the road in question in this case daily.

The Court sustained such objection. To which ruling of the Court the defendant excepted at the time.

Def't's Motion for New Trial.

7.

Examination in chief of RICHARD N. ELLIOTT, a witness called on behalf of the defendant, testifying under oath:

Questions by Mr. CONNER:

Q. State, Mr. Elliott, if you know, how many freight trains are now being operated and have been operated during the las- year over the railroad in question in this case daily.

To which question the pla-ntiff objected, upon the ground that it was wholly immaterial to any of issues in this cause. The defendant railroad company, if it owns the railroad or operates it and known as a party interested in the cause, is subject to the law, and the law is the same whether there be many or few trains, and the evidence can throw no light upon the questions at issue, or the measure of damages.

57 & 58 Thereupon the defendant states to the Court that it proposes to prove, in answer to this question, that there is now being operated, and has been at all times during the last year, as many as ten freight trains each way daily over the portion of the railroad in question.

The Court sustained such objection. To which ruling of the Court the defendant excepted at the time.

Def't's Motion for New Trial.

8.

Examination in chief of CARL L. HANSEN, called as witness on behalf of the plaintiff, testifying under oath:

Question by Mr. MCGHEE:

Q. You spoke of this I. and C. What division or what section has been under your supervision?

A. The construction work from Glenwood to Connersville.

Q. State whether or not that construction work covers the great arch and fill at William's Creek.

A. It does, yes sir.

Q. State to what extent, if any, there were cuts and excavations made under your supervision.

To which question the defendant objected, upon the ground that that is not a thing material to this cause.

By Mr. MCGHEE:

I am simply showing the experience he has, and how close it is to Connersville.

The Court overruled such objection. To which ruling of the Court the defendant excepted at the time.

A. Yes, we had quite a good many cuts and fills.

59 Examination-in-chief of CARL L. HANSEN, called as witness on behalf of the plaintiff, testifying under oath:

Questions by Mr. McGHEE:

Q. Just in rough figures, about how many cubic yards of fills were made?

To which question the defendant objected, upon the ground that the number of cubic yards of cuts and fills in the construction of this traction company is not a fact that is material to be considered in this cause.

By the COURT:

That, of course, is true, but I assume that this is a preliminary question, as showing his general experience.

The Court overruled such objection. To which ruling of the Court the defendant excepted at the time.

A. Oh, something between three hundred and fifty and four hundred thousand yards.

Def't's Motion for New Trial.

10.

Examination-in-chief of CARL L. HANSEN, called as a witness on behalf of the pla-ntiff, testifying under oath:

Questions by Mr. McGHEE:

Q. How close to the City of Connersville did this work come?

To which question the defendant objected, upon the ground that it was wholly immaterial.

The Court overruled such objection. To which ruling of the Court the defendant excepted at the time.

11.

Examination-in-chief of CARL L. HANSEN, called as witness on behalf of the pla-ntiff, testifying under oath:

60 Questions by Mr. McGHEE:

Q. Did you make a calculation of the number of cubic yards of earth that would necessarily be removed in order to open up that way, sixty-six feet wide?

A. Yes sir.

To which question the defendant objected, and moved the Court to strike from the record the answer of the witness, upon the ground that it leaves the witness to determine what would be necessary to be removed.

The Court overruled such objection. To which ruling of the Court the defendant excepted at the time.

Def't's Motion for New Trial.

12

Examination-in-chief of R. J. GREENWOOD, called as a witness on behalf of the pla-ntiff, testifying under oath:

Questions by Mr. MCGHEE:

Q. About how far, either in the city squares or rods, about how far does Grand Avenue run south from this railroad?

To which question the defendant objected, upon the ground that it was immaterial.

The Court overruled such objection. To which ruling of the Court the defendant excepted at the time.

A. About fourteen squares.

4. For error in the assessment of the amount of recovery in that it is too small.

5. The Court erred in refusing to permit the defendant to prove by competent evidence offered at the trial the cost of constructing the abutments and bridges necessary to take the place of the embankment herein involved.

ELAM & FESLER,
61 REUBEN CONNER,
FORKNER & FORKNER,
Att'ys for Def't.

Motion for New Trial Overruled.

Which is submitted to and overruled by the Court, to which ruling of the Court the defendant objected and excepted at the time.

Exception.

And thereupon the Court renders judgment upon the verdict of the jury herein.

Judgment.

It is therefore ordered, adjudged and decreed by the Court that the defendant recover of and from the plaintiff the sum Eight Hundred Dollars, together with interest at the rate of six per cent from the — day of November, 1906, as damages for the laying out and extending of Grand Avenue in the City of Connersville, Indiana, through, over and across the right of way and property of the defendant and likewise its costs and charges herein laid out and expended, to the rendition of which judgment of the Court, the defendant objected and excepted at the time, and 90 days' time is given in which to prepare and file all bills of exceptions.

Time for Bills of Ex.

Appeal Prayed & Granted.

And thereupon the said defendant prays an appeal to the Appellate Court of Indiana, which is granted to the defendant by the Court, and the defendant is given 90 days in which to file an appeal bond in the sum of Five Hundred Dollars with —— —— as surety which bond is approved by the Court.

Be it remembered that afterwards, to-wit: on the 26th day of November, 1906, the same being the 49th day of the October Term, 1906 the following further proceedings were had in the above entitled cause in said Court and before said Judge:

No. 1342.

CITY OF CONNERSVILLE
vs.
62 CINCINNATI, INDIANAPOLIS & WESTERN RAILROAD COMPANY.

Appeal.

Def't Files Bill of Ex. No. 1, Containing Instruction.

Comes now the defendant, the Cincinnati, Indianapolis & Western Railroad Company and files its bills of exceptions containing the instructions after the same had been duly signed and certified by the Judge of the Henry Circuit Court, which bills of exceptions *is* in these words, to-wit:

Bills of Exceptions No. 1.

STATE OF INDIANA,
Henry County:

Henry Circuit Court, October Term, 1906.

CITY OF CONNERSVILLE
vs.
C., I. & W. RAILWAY COMPANY.

Be it remembered that on the 17th day of November, 1906, the same being the 42nd judicial day of the October Term, 1906, of said Court the following pleas and proceedings were had in said cause before the Honorable John M. Morris, sole Judge of said Court:

Def't's Ex. to Instructions Given.

1. That on the trial of said cause the Court gave to the jury of its own motion the following instructions numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 12½, 13, 14, 15, & 16 respectively and that to the giving of said instructions and the giving of each one thereof separately and severally the defendant at the time *expected.*

63 No. 1342.

CITY OF CONNERSVILLE
vs.
CINCINNATI, INDIANAPOLIS & WESTERN RAILWAY COMPANY.

Court's Instructions in Bill No. 1.

1.

GENTLEMEN OF THE JURY: This is a proceeding instituted by the City of Connersville against the defendant to open a street known as Grand Avenue in the City of Connersville, Indiana, over and across the defendant's railroad and right of way. The transcript which will be treated *as* by the Court as the pla-ntiff's complaint in this action, contains and states the following facts: That on the 5th day of September, 1904, the City of Connersville adopted a resolution as follows:

Whereas, the railroad embankment which crosses Grand Avenue in the City of Connersville, between Ninth and Eleventh Streets obstructs the passage between the north and south ends of such street, and whereas it is by many considered and believed to be a matter of public necessity that said Grand Avenue be opened up as a public street through said embankment now therefore be it resolved by the Common Council of said City that the expedience of referring the matter of opening up said street through said railroad embankment to the City Commissioners of said City be and the same is hereby referred to the Committee on streets, alleys and bridges of said City, and said Committee is hereby directed to make its report at the next regular meeting of this Common Council.

That on September 19, 1904, the Committee on Streets, alleys and bridges reported as follows:

The undersigned hereby report that they deem it expedient to refer the opening of Grand Avenue through the Cincinnati, Indianapolis & Western Railroad to the City Commissioners, which report was signed by the —.

64 That on the 19th day of September, 1904, it was unanimously resolved by the Common Council of the City of Connersville that the question of the advisability and public utility of opening up said Grand Avenue through the railroad embankment as aforesaid, be and the same was referred to the City Commissioners of said City, and said City Commissioners were directed to meet at the Council Chamber in said City on October 6th, 1904, at nine o'clock in the forenoon and report to the Council, and the Clerk was directed to notify said Commissioners of this reference and of the time and place of their meeting. That thereafter on February 6, 1905, the said Committee reported that the opening of said Avenue through said railroad embankment would be of public utility, and that the real estate to be appropriated by the opening of said Grand Avenue is so much of said railroad embankment as extends

Court's Instructions.

the entire width of said Grand Avenue as now used and opened, immediately north and immediately south of said railroad embankment, and being sixty-six feet in width, and of the length of about sixty-six feet.

The tract to be appropriated being a tract of ground sixty-six feet square and occupied by said railroad embankment. That the owner of said real estate *thought* to be appropriated, is the Cincinnati, Indianapolis & Western Railroad Company, and that afterwards, on the 17th day of April, 1905 said City Commissioners reported that the property of said defendant so proposed to be appropriated is of the value of one hundred and fifty dollars. That upon the filing of said report, it was resolved by the Common Council of said City of Connersville, that the report of said Commissioners, as aforesaid, is hereby accepted, and that the real estate above described should be appropriated for the purpose of opening said Grand Avenue.

65 2.

From these proceedings the defendant appealed to the Circuit Court of Fayette County, Indiana, and in that Court filed its exceptions in four paragraphs, in which it alleges, in substance, that it is the owner of the right of way of what is generally known as the Cincinnati, Indianapolis and Western Railroad, *of which* the land and real estate appropriated for a street, in the proceedings had and taken by the City Commissioners of the City of Connersville, and the Common Council of said City, and that the lands so attempted to be appropriated in these proceedings for street purposes is a part of this exceptor's right of way and said railway company objects to the report of said City Commissioners in said matter, in which said City Commissioners assesses damages and benefits, and to the action of the Common Council of said city in adopting, approving and confirming said report, for the following reasons named:

Court's Instructions.

First: That the damages assessed on account of the appropriation of this exceptor's said land for said street purposes are too small, that this exceptor will, by reason of the appropriation of its said part of its said right of way, sustain*ed* damages in the sum of twelve thousand dollars; second, because the damages assessed on account of the value of said land appropriated for street purposes are too small; third, because this exceptor did have at the time said appropriation proceedings were commenced, has had ever since, and has now, valuable and lasting improvements situated upon the real estate appropriated that will be destroyed and become worthless by the construction of said street to this exceptor's damage in the sum of twelve thousand dollars, and that City Commissioners did not, nor did said Common Council, assess any damages in favor of this exceptor nor any

66 one else on account of the destruction and the appropriation of said improvements. To the fourth specification of exception, the Court has sustained a demurrer and that specification is not before you for your consideration.

3.

In this Court the defendant has filed a fifth specification of exceptions and objections to the report of City Commissioners in said matter in which it alleges in substance, that in the year 1848 the grantor of this defendant acquired the rights of way in fee simple over and across the land which it is proposed to open and establish a street as named and described in the proceedings herein, under and pursuant to a special charter of the State of Indiana, granted the said grantor the full right to acquire said right of way in fee simple. That it immediately took possession of said right of way and constructed over the same a railroad extending from the City of Cincinnati, Ohio, to the City of Indianapolis, Indiana and that said railroad has been constantly and continuously operated from that time to the present time. That at the time said right of way was acquired, and said railroad was built, the land over which it extended and over which it is proposed to open locate, and establish said street was an open field, not within the limits of the then town, now city of Connersville, and was in no wise subject to the jurisdiction of said town. That said company, in constructing its road over and across the point where said street is proposed to be located, constructed an embankment of earth sixty-six feet wide at the bottom and twenty-two feet high, with a slope of approximately forty-five degrees at each side. That said embankment was constructed of solid earth, and has been maintained as such, and is now a solid earthen embankment. That upon said embankment the said company laid and constructed a single track railroad, which has been operated from that time until the present time. That the ground proposed to be occupied by said street and the earthen embankment aforesaid, which it will be necessary to remove and carry away, in order to enable said street to be opened over and upon said right of way, and the construction of necessary abutements and bridges over said proposed street will cost said company the sum of twelve thousand dollars, and the embankment and right of way proposed to be taken for said street is of the value of five thousand dollars. That for more than fifteen years after said road was built and constructed the ground through which it was constructed at the time aforesaid and lying north thereof remained open agricultural land used and adapted to no other than agricultural purposes. That one square east of the point where it is proposed to open said street through said right of way there is a public street of said city, and the land platted on the north thereof with an undergrade crossing. That one square west there is another well improved street of said city, through said platted territory to the north upon an under grade crossing. That the two streets above named furnish at all times an ample way to travel to the inhabitants of said city and all other persons having occasion to pass from one part of said city to another. That the location, opening and establishment of said street will take the property of the defendant aforesaid of the value aforesaid, all of the value and to the extent of the sum of fourteen thousand

Court's Instructions.

67

Court's Instructions.

dollars: wherefore the defendant demands judgment that said report of said Commissioners be set aside, and that they recover of said city the full amount of the damages aforesaid, to-wit: the sum of fourteen thousand dollars.

4.

To the first, second, third and fifth specifications of the
68 defendant's exceptions to the report of the City Commissioners, the pla-ntiff has filed its reply in general denial; the second paragraph of reply alleges in substance, that, at the point where it is proposed to open up said Grand Avenue, the defendant has but a single track of railroad and no improvements whatever upon said ground except its single line of railway, and the embankment upon which the same is constructed, and that no other or different improvements of said railway are across said Grand Avenue at the point where the same has been ordered to be opened up for the purposes of a street; and the third paragraph alleges in substance the same facts as are contained in the second paragraph.

5.

Under the issues thus formed, the only question for your consideration in this case is the amount of damages, if any, that should be allowed to the defendant.

6.

The burden rests upon the defendant to prove all of the material averments of one or more of its exceptions by a fair preponderance of all the evidence given in the cause.

7.

Court's Instructions. The burden rests upon the pla-ntiff to prove, by a fair preponderance of all the evidence given in the cause, all of the material averments of one or both of its second or third paragraphs of reply.

8.

The City of Connersville has the right to open the street known as Grand Avenue over and through defendant's right of way: as has been done by the proceedings in this case; it also has the right to cause buildings, structures, or other things in the way of opening said street to be taken down, removed and appro-
69 priated upon the payment of damages as provided by law.

9.

Under the statutes of this state it is the *duty* of all railroad companies to construct and keep in safe and good condition all highway crossings, and this duty is the same whether the highway was established before or after the railroad was built.

10.

The law also requires a railroad company to keep its railroad and right of way in a reasonably safe condition for the transportation of

passengers and freight, and therefore in the opening of the street proposed, the excavation and removal of the embankment through which the proposed street will pass, and the expense thereof, will be imposed upon the railroad company.

11.

If, under the evidence in this cause, and the law applicable thereto as given to you by the Court, you should find that the defendant railroad company is entitled to any damages, then in determining the amount of such damages, you should take into consideration the value of any land of the defendant actually taken and appropriated, if any, the value of the embankment necessarily taken, if any, and the cost of the removal of embankment, if any, as shown by a fair preponderance of the evidence and the sum of these items would constitute the full measure of defendant's damages.

Court's Instructions.

12.

It being the duty of the defendant railroad company to construct and keep in safe and good condition all highway crossings, the defendant in this action would not be entitled to any damages for constructing the necessary crossing nor abutements and bridge for supporting its railroad over and across said street when constructed.

70

10½.

You are the exclusive judges of the evidence and of its weight and of the credibility of the witnesses. It is your duty to consider all the evidence given in the cause, and therefrom determine what facts have been proven or not proven.

13.

It is your duty to take the law to be as stated by the Court in these instructions.

14.

If you find for the defendant, the form of your verdict will be: "We the jury, find for the defendant, The Cincinnati, Indianapolis and Western Railroad Company, and assess its damages at (here state the amount)."

15.

If you find that the defendant is not entitled to any damages whatever, the form of your verdict will be: "We, the jury, find for the plaintiff."

16.

Court's Instructions.

Appoint one of your number foreman of the jury. It will be his duty to sign your verdict for you as foreman, and when you agree upon a verdict and cause the same to be signed by your foreman, return the same into open court.

JOHN M. MORRIS,
Judge Henry Circuit Court.

71 *Def't's Instructions.*

2. That on the trial of the said cause the defendant requested the Court to give to the jury the following instructions, numbered 1, 2, 3, 4, 5, 6, 7, 8, & 9 respectively.

72 STATE OF INDIANA,
Henry County, ss:

Henry Circuit Court, October Term, 1906.

No. 1342.

CITY OF CONNERSVILLE
vs.
CINCINNATI, INDIANAPOLIS & WESTERN RAILWAY COMPANY.

The Cincinnati, Indianapolis & Western Railway Company the defendant in the above entitled cause before the beginning of the argument therein requests the Court to give to the jury each of the following instructions that is to say:

Def't's Instructions in Bill No. 1.

1. If under the evidence in this cause and the law applicable thereto as given you by the Court you should find that the defendant Railroad Company is entitled to any damages then in determining the amount of such damages you should consider the character of the property, if any, belonging to the defendant appropriated for the proposed street, and the use to which said property has been and is devoted by the defendant, its fitness or unfitness for such use, and award such damages as will fairly compensate the defendant for such property.

2. If property is taken for public use that has a peculiar value to the owner on account of its being devoted and adapted to a particular use then such owner should be compensated for its taking by assessing his damages at such value.

(Ohio Valley & Co., vs. Keith, 130 Ind. 314.)
(4 Sutherland Damages. See 1074.)

3. When property is taken for public use that by its situation or its relation to other property of the owner, or its fitness for use in connection with and as a part of one entire piece of property owned by the same owner, has a peculiar value and such value is shown then it becomes the basis for assessing damages; and this is true even though it has a less general market value. An owner so situated is not entitled to fanciful or sentimental dam-
73 ages but he is entitled to such damages as will fairly compensate him for the loss he sustains in having his property appropriated for the public use even though it might be worthless or even nothing at all to any other person.

4. Applying these rules to the case on trial the Court instructs you that in determining the amount of the defendant's damages, if you should find it entitled to any, you should consider the value of any of its property taken as used in connection with its line of railroad and as a structural part thereof and for the use to which it is devoted by the defendan*d* and for which it or its predecessors in interest have fitted it.

5. When a street is opened through the right of way of a railroad company such company is not limited, when seeking compensation, to damages for the use of the land occupied by the street but the damages awarded should include any extra expense that necessarily and proximately results from such opening in making structural changes in the property of the railroad company in order that it may be operated as a railroad, but expense made necessary for the sole purpose of complying with the police regulations of the state or city should not be included.

Def't's Instructions.

(City vs. Grand Rapids (Mich.) 33 N. W. 15).

6. If the appropriation of the defendant's property under the proceedings set forth in this case will necessarily and proximately cause expense to the defendant in constructing a bridge to carry its railroad over the proposed street in order that its railroad tracks may have support and its railroad may be operated as such, and as an entire line, and such construction of said bridge will be required for no other purpose then, in determining the defendant's damages you should consider the expense of constructing such bridge.

74 7. If you find from the evidence that the establishment and opening of the street in question will necessarily take a certain portion of the defendant's right of way and necessitate the removal of an embankment thereon (if any) constituting a part of the defendant's road bed, the defendant would be entitled to recover the reasonable value of said land so taken, if any, and the embankment thereon, (if any) and in determining the value thereof you should consider their value for the uses to which they are adapted and for which they are used and fix their value for the uses and purposes to which they are adapted and for which they are used.

8. If the defendant's railroad as constructed and used without the proposed street being opened is and may be operated at the point where it is proposed to open said street and would be equally so if carried across the street upon an overhead bridge but such operation would be no more safe for the public after such change than before then such change would not be made in compliance with or on account of any police regulation but would be a structural change for which damages should be allowed in this action.

Def't's Instructions.

9. When a street is opened and established across a railroad right of way already constructed not in the line or location of any pre-existing street or highway, the railroad is not entitled to recover as damages for anything required of it under the police regulation such as providing necessary planking, cattle guards, wing fences, gates signals and the like, but it would be entitled to compensation for the value of any lands

actually taken, embankments necessarily destroyed and carried away and the necessary costs of restoring its right of way to its original usefulness.

FORKNER & FORKNER,
REUBEN CONNER, AND
ELAM & FESLER,
Att'ys for Defendant.

75 & 76 *Def't's Exceptions to Refusal of Instructions.*

That said instructions so asked by the defendant and each one thereof was applicable to the evidence given in said cause and the Court refused to give said instructions and each one thereof separately and severally, and that to the refusal of the Court to give said instructions and to the refusal to give each one thereof separately and severally the defendant at the time excepted.

Court's All Instructions.

And be it further remembered that the said instructions so given by the Court of its own motion were all of the instructions given in said cause.

Bill No. 1, Signed & Filed.

And the defendant now during the term aforesaid and within the time given by the Court tenders this, its bill of exceptions and prays that the same be signed, sealed and made a part of the record, which is done in open Court this 26th day of November, 1906.

JOHN M. MORRIS,
Judge of the Henry Circuit Court.

Be it remembered that afterwards, to-wit: on the 6th day of December, 1906, the same being the 4th Judicial Day the December Term, 1906, the following further proceedings were had in the above entitled cause in said Court and before the Honorable John M. Morris, Sole Judge of said Court.

No. 1342.

CITY OF CONNERSVILLE
vs.
CINCINNATI, INDIANAPOLIS & WESTERN RAILWAY COMPANY.

Appeal.

Def't Files Bill of Ex. No. 2, Containing Evidence.

Comes now the defendant, The Cincinnati, Indianapolis and Western Railroad Company, and files its bill of exceptions containing the evidence, after the same had been signed and certified by the Judge of the Henry Circuit Court, which said bill of exceptions is in these words, to-wit:

77 No. 1342.

CITY OF CONNERSVILLE
vs.
CINCINNATI, INDIANAPOLIS AND WESTERN RAILROAD COMPANY.

Index to Bill No. 2.

Index.

78 STATE OF INDIANA,
County of Henry:

In the Henry Circuit Court, October Term, 1906.

Number 1342.

THE CITY OF CONNERSVILLE
vs.
THE CINCINNATI, INDIANAPOLIS AND WESTERN RAILROAD COMPANY.

Caption to Bill.

Bill of Exceptions, Containing Evidence, Rulings at the Trial, and Exceptions Reserved at the Trial.

Be it remembered that on the Fifteenth day of November, 1906, the above entitled cause came on for trial in said Court and before

the Honorable judge thereof; a jury being duly impanelled and sworn, the said cause was submitted to the jury for trial. That before the beginning of said trial, Fay Holaday was duly appointed and sworn as the stenographer and shorthand reporter to take down the oral evidence and to note all objections and exceptions and the rulings of the court on the introduction of evidence in said cause.

And the defendant, to maintain and support the issues on his behalf, gave and introduced the following evidence:

Transcript in Evidence by Def't.

It is admitted for the purposes of this trial by the parties hereto, that Exhibit number One is a transcript of the Clerk's record of the Common Council of the City of Connersville, Indiana, and as filed in this case, and that the same may be read in evidence in lieu of the original entries, papers and records.

And here said transcript of the clerk's record of the Common Council of the City of Connersville, marked Exhibit "1", was introduced and read in evidence, and was in the words and figures following, to-wit:

79 "EXHIBIT 1.

STATE OF INDIANA,
Fayette County, ss:

In the Matter of the CITY OF CONNERSVILLE
vs.
THE CINCINNATI, INDIANAPOLIS AND WESTERN RAILROAD COMPANY, Regarding the Opening of Grand Avenue Through the Railroad Embankment.

Transcript.

Transcript of the Proceedings in Said Matter Had Before the Common Council of said City.

Minute Record "E" page 218. September 5th, 1904.

On motion of Miller the following resolution was adopted:

Whereas the railroad embankment which crosses Grand Avenue in the City of Connersville, in Fayette County, Indiana, between Ninth and Eleventh Streets obstructs the passage between the North and South ends of said street, and Whereas it is by many considered and believed to be a matter of public necessity that said Grand Avenue be opened up as a public street through said railroad embankment, now therefore be it resolved by the Common Council of said City of Connersville that the expediency of refer-ing the matter of opening up said street through said railroad embankment to the City Commissioners of said City be, and the same is hereby refer-ed to the Committee on Streets, Alleys and Bridges of said City, and said Committee is hereby directed to make its report at the next regular meeting of this Common Council.

Page 223. September 19th, 1904.

Committee on Streets, Alleys and Bridges reported as follows:

"Report of Committee on Streets, Alleys and Bridges.

The undersigned hereby report that they deem it expedient to refer the opening of Grand Avenue through the C. I. & W. railroad to the City Commissioners. Signed this 19th day of September, 1904.

WILLIAM MERRELL,
CHAS. REIDER,
SIMON DOENGES,

Com't.

Page 334. September 19, 1904.

The following resolution was read and on Motion adopted by unanimous vote of the Council:

80 *Transcript.*

Whereas it is thought to be advisable and necessary by many of the citizens and tax payers of this city to open up Grand Avenue through the Railroad embankment which crosses said -treet between 9th and 11th streets and whereas the Committee on Streets, Alleys and Bridges, to which the expediency of refer-ing the matter of the proposed opening of said Street, to the City Commissioners, has reported in favor of making such reference; Now therefore be it resolved by the Common Council of the City of Connersville, that the question of the advisability and public utility of opening up said Grand Avenue through the railroad embankment crossing the same between 9th and 11th Streets, in said City be and the same is hereby referred to the City Commissioners of said City *Commissioners of said City* and said City Commissioners are hereby directed to meet at the council chamber in said City on October 6th, 1904 at 9 o'clock in the forenoon and that after due consideration said commissioners shall report to the Council, and the Clerk is directed to notify said Commissioners of this reference and of the time and place of their meeting.

Minute Record "E," page 239, November 7th, 1904.

It appearing that the present City Commissioners were not eligible to serve in opening Grand Avenue under the railroad, the following were appointed in their places: Wm. Newkirk, Ward Jemison, William Sherry, William Heeb, Jr. and J. C. Turkenkoph.

Page 243. December 5th, 1904.

It appearing that William Newkirk and William Heeb Jr. are interested in opening Grand Avenue, on motion S. O. McKennan

was substituted for William Newkirk, and William T. Edwards for Wm. Heeb, Jr. and December 21", 1904 was set as the time and the Council room as the place for the meeting of said City Commissioners.

CONNERSVILLE, INDIANA, *December 5th,* 1904

To Frank Elwood, marshall of City of Connersville, Indiana:

You are hereby directed to notify Wm. T. Edwards, J. C. Turkenkoph, William Sherry, S. O. McKennan and Ward Jemison, City Commissioners pro tem. of the City of Connersville, that the Common Council of the City of Connersville, in regard to the opening of Grand Avenue, has fixed Wednesday, December, 21st, 1904, at 9 o'clock A. M. at the Council Chamber in the City of Connersville Fayette County, Indiana, as the time and place when and where said City Commissioners shall meet to designate the lots and parcels of ground, and the names of the owners thereof, benefited or damaged by said improvements. By order of Council.

JACOB S. CLOUDS,
City Clerk.

Page 252. Feb. 6th, 1905.

81 Report of the City Commissioners designating the lots and parcels of ground benefited or damaged by the opening of said Grand Avenue, and the one setting the time to make the assessment were received and placed on file.

Transcript.

Report of the City Commissioners.

To the Common Council of the City of Connersville, Fayette County, Indiana:

We, the undersigned city Commissioners of said City to whom your honorable body has referred the matter of the proposed opening up of Grand Avenue in said City through the railroad embankment which crosses the line of said street between 9th and 11th Streets in said City would respectfully report that pursuant to the notice given by the Clerk of said Council we met at the City Hall on the 20th day of December, 1904, and proceeded to examine the property sought to be appropriated by the opening of said street and to view and examine the real estate in the vicinity thereof to be benefited or injured by such proposed improvement and we find that the opening of said avenue through said railroad embankment would be of public utility and that the real estate to be appropriated by the opening of said Grand Avenue is so much of said railroad embankment as extends the entire width of said Grand Avenue as now used and opened immediately north of and immediately south of said railroad embankment, and being sixth-six (66) feet in width and of the length of about sixty-six (66) feet, being all the real estate that lies north of

the end of said Grand Avenue North of Ninth Street as said Grand Avenue is now opened and used and South of the end of Grand Avenue South of 11th Street as said Grand Avenue is now opened and used. The tract to be appropriated being a tract of ground sixty-six (66) feet square and occupied by said railroad embankment. That the owners of said real estate sought to be appropriated are the Cincinnati, Hamilton & Dayton Railway Co., the Cincinnati, Hamilton & Indianapolis Railway Co., or the Cincinnati, Indianapolis & Western Railway Co., or one or two of them—these Commissioners being unable to inform themselves as to which, and the legatees under the will of Abraham B. Conwell, Deceased. The last named own the fee simple thereof and the said railroad Company or Companies own the railroad right-of-way to which said fee simple is subject. And we find that no real estate will be damaged by such opening other than the real estate so sought to be appropriated, and we further find that the real estate abutting on both sides of said Grand Avenue, between 11th and 9th Streets will be beneficially affected by said opening, all of which real estate is situated in the Southeast quarter of Section Twenty-four (24), Township Fourteen (14), Range Twelve (12), in the City of Connersville, County of Fayette, State of Indiana, and we further find that said real estate above described as beneficially affected is owned by John T. Wilkin, Sabina Patton, William Bearley, Catherine Welsh, David W. McKee, Carrie F. Theders, David H. Showalter, Francis T. Roots, Charles Winters, Mary Heeb, Malinda Bertsch, Heman Jones, Henry
82 Luking heirs, Theodore P. Heineman and John H. Rieman as follows:

Transcript.

On West side of Grand Avenue.

John T. Wilkin, tract with frontage thereon of 169 5/10 feet, as described in Town Lot Deed Record 12, page 43 of said County, benefit $19.70

Sabina Patton, tract with frontage of 49 feet thereon, as described in Town Lot Record 13, page 216, of said County $5.72

William Bearly, tract with 33 1/3 feet frontage thereon, described in Town Lot Record 13, page 260 of said County.. $3.89

David W. McKee, tract of 57 3/10 feet frontage thereon, as described in Town Lot Record 10, page 388 of said County $6.68

Catherine Welsh, tract of about 60 feet frontage thereon, and being all of the tract described in Town Lot Record 4, page 180 in said County, except the tract described in Town Lot Record 10, page 388, as owned by said David W. McKee $7.00

Carrie F. Theders, the part of Lot one (1) in Conwell's Northwest Addition to said City, fronting thereon that is described in Town L. Record 13, page 262 of said County. Frontage 104 ..... $12.09

David H. Showalter, Lots Two (2) and Three (3) of Conwell's Northwest Addition to said City. Frontage 165.... $19.25

On East side of Grand Avenue, as follows:

Francis T. Roots, real estate with 165 feet frontage thereon as described in Town Lot Record No. 8, page 499 of said County $19.25

Charles Winters, real estate with 40.5 frontage thereon, as described in Town Lot Record 7, page 547, of said County $4.73

Mary Heeb, real estate with 41.25 feet frontage thereon, as described in Town Lot Record 8, page 562, of said County $4.82

Malinda Bertsch, real estate with 41.25 feet frontage thereon, as described in Town Lot Record 9, page 425, of said County $4.82

83 *Transcript.*

Heman Jones, real estate with 41.25 feet frontage thereon, as described in Town Lot Record 5, page 578, of said County $4.82

Heirs of Henry Luking (names of which are unknown) real estate with 36 feet frontage thereon, as described in Deed Record 6, page 160, of said County..... $4.20

Theodore P. Heineman, Lot No. Six (6), Block Three (3) of Conwell's North Addition to said City fronts 118..... $13.78

John H. Rieman, Lots Five (5) and Four (4), Block Three (3) of Conwell's Addition to said City, 165..... $19.25

All of which is respectfully submitted.

This 4th day of January, 1905.

SAMUEL O. McKENNAN,
WILLIAM T. EDWARDS,
JULIUS C. TURKENKOPH,
WARD JEMISON,
WM. H. SHERRY,
City Commissioners.

To the Common Council of the City of Connersville and all others concerned:

The undersigned City Commissioners in the matter of the opening of Grand Avenue through the Railroad embankment between 11th and 9th streets in said City hereby give notice that they will, on Wednesday, the 1st day of March, 1905, at the City Hall in said City of Connersville meet to estimate the injuries and benefits to the property sought to be appropriated and the benefits and damages to all real estate injuriously or beneficially affected by the opening of said Grand Avenue.

All of which is respectfully submitted.

Witness our names this 4th day of January, 1905.

SAMUEL O. McKENNAN,
WILLIAM T. EDWARDS,
JULIUS C. TURKENKOPH,
WARD JEMISON,
WM. H. SHERRY,
City Commissioners.

Office of Jacob S. Clouds, City Clerk.

CONNERSVILLE, INDIANA, *Jan.* 23", 1905.

To Frank Elwood, Marshall City of Connersville:

You are hereby directed to notify John T. Wilkin, Sabina
84 Patton, William Bearly, David W. McKee, Caroline Welsh, Carrie F. Theders, David H. Showalter, Francis T. Roots, Charles Winters, Mary Heeb, Malinda Bertsch, Heman Jones, Theodore P. Heineman, John H. Reiman, and Henry Luking heirs, that the report of the City Commissioners designating the lots and parcels of ground benefited or damaged by the opening of Grand Avenue under the C., I. and W. Railroad, has been filed with the City Clerk and said Commissioners have fixed Wednesday March 1st, 1905, at the City Hall in the City of Connersville, Fayette County, Indiana, as the time and place when and where said City Commissioners will meet to assess the benefits and damages on account of said opening of said Grand Avenue, at which time all persons interested are entitled to a hearing.

JACOB S. CLOUDS,
City Clerk.

Hav*ing* served the contents *hear* named within by reading to each party named.

FRANK ELWOOD.

Transcript.

Notice of Meeting of City Commissioners on Benefits and Damages in Opening Grand Avenue and the C., H. & I., or C., I. & W. Railroad.

CONNERSVILLE, INDIANA, *Jan.* 10, 1905.

Notice is hereby given that the report of the City Commissioners designating the lots and parcels of ground benefited or damaged by the opening up of Grand Avenue under the C., H. and I., or C., I. and W. railroad between 9th and 11th Streets in the City of Connersville, Fayette County, Indiana, has been filed with the City Clerk, of the City of Connersville, Indiana, and that said City Commissioners have fixed Wednesday the 1st day of March, 1905, at the City Hall in said City of Connersville, as the time and place when and where said City Commissioners will meet to estimate the injuries and benefits to the property sought to be appropriated and the benefits and damages to all real estate injuriously or beneficially affected by the opening of said Grand Avenue.

By order of City Commissioners.

JACOB S. CLOUDS,
City Clerk.

Editor's Affidavit.

STATE OF INDIANA,
Fayette County, ss:

Personally appeared before the undersigned, John W. Fawcett, Jr., manager of the Examiner, public daily Newspaper of general circulation printed and published in Connersville in the county aforesaid, who, being duly sworn upon his oath says that the notice of which the attached is a true copy, was duly published in said paper for 4 times successively, the first of which publication- was on the 10th day of Jan. 1905, and the last on the 31 day of Jan. 1905.

JOHN W. FAWCETT, JR.

85 Subscribed and sworn to before me, this 1 day of March 1905.

[SEAL.] JACOB S. CLOUDS,
City Clerk.

Transcript.

CONNERSVILLE, INDIANA, *March 4th*, 1905.

To the Cincinnati, Hamilton and Dayton Railway Co., the Cincinnati, Hamilton and Indianapolis Railway Co., and the Cincinnati, Indianapolis & Western Railway Co.:

You are hereby notified that the City Commissioners will meet at the Council Chamber in the City Hall, in the City of Connersville, Fayette County, Indiana, on Wednesday March 15th, 1905, between the hours of nine o'clock A. M. and Four O'clock P. M. for the purpose of estimating injuries and benefits, and do such other things as may be necessary and in accordance with their duties as prescribed by statute in the opening of Grand Avenue in said City under the railroad of one of the above named Companies.

Witness my name this 4th day of March, 1905.

JACOB S. CLOUDS,
City Clerk.

Served by reading to J. L. Graff and E. Wysong, agents of the Cincinnati, Hamilton and Dayton Railway Co. residing within said City, having been unable to find any agent, officer or employee of either of the other Railroad Companies within said City or County.

This 4th day of March, 1904.

FRANK ELWOOD,
City Marshall.

Page 264. April 17th, 1905.

Report of City Commissioners on opening of Grand Avenue as follows:

The undersigned City Commissioners, pro tempore, of the City of Connersville, State of Indiana, respectfully report in the matter

of opening Grand Avenue through the Railroad embankment which crosses the line, or end of said Street, between 9th and 11th Street in said City, that pursuant to the notice filed with the Clerk of said City, and filed with the former report in this matter, that they met at the City Hall in said City at two o'clock P. M., on March 1st, 1905, and they entered upon the consideration of the matter of opening said Grand Avenue as above and of the parties found to be benefited in former report there was present or represented David W. McKee, Charles Winters, Mary Heeb, Malinda Bertsch, Heirs of Henry Luking and John H. Rieman, and it appearing that the City Clerk had issued a notice to all parties found to be benefited in the former report and that the marshall of said City had served such notice at least 10 days before said 1st day of March, 1905, and that the City Clerk had caused a like notice to be published as required by law to the Cincinnati, Hamilton and Dayton Railway Company, the Cincinnati, Indianapolis and Western Rail-
86 way Company, and the Cincinnati, Hamilton and Indianapolis Railway Company, but it further appearing that one or two or all of said railway Companies had officers or agents residing in said City, said Commissioners adjourned to meet at the same place on March 15th, 1905 and ordered the said City Clerk to issue notices to said Companies and caused the same to be served by the Marshall of said City ten days before said 15th day of March, of the meeting of these Commissioners as required by law. Thereupon said City Commissioners met pursuant to adjournment on March 15th, 1905, at the City Hall at Two o'clock p. m. At such meeting there was present Theodore P. Heineman and also E. Wysong, Superintendent of Bridges of the Cincinnati, Hamilton and Dayton Railway Company, T. M. Little, who was Attorney for the Cincinnati, Hamilton and Dayton Railway Company, while disclaiming to appear for said Railroad Company severely criticized these Commissioners for their proposed action in this matter. Thereupon they determined values and benefits and do hereby now report in said matter as follows:

Transcript.

Property to be appropriated:

That it will be necessary to appropriate the following property of the value named:

Description. Part of the Southeast Quarter of Section Twenty-four (24), Township Fourteen (14), Range Twelve (12), in Fayette County, State of Indiana, and described: all that tract of land occupied by the railroad embankment, between 9th and 11th Streets in the City of Connersville, that lies between the North and South ends of Grand Avenue as now opened and used, and at the foot of the said railroad embankment, and running thence North with the East line of said Grand Avenue extended a distance of sixth-six (66) feet more or less to the South east corner of said Grand Avenue, as now opened and used, on the North of said railroad embankment: thence west along the foot of said embankment and across the South end of said Avenue Sixth six (66) feet more or less to the Southwest

corner of said Avenue; thence South on the West line of said Grand Avenue extended Sixty six (66) feet more or less to the Northwest corner of said Grand Avenue as now used and opened South of said railroad embankment and to the foot of said railroad embankment; thence Eastwardly across the North end of said Grand Avenue and with the foot of said railroad embankment Sixty six (66) feet more or less to the place of beginning, and that said real estate so proposed to be appropriated is of the value of $150.00, and its ownership is either in the Cincinnati, Hamilton and Dayton Railway Company, the Cincinnati, Indianapolis and Western Railway Company, or the Cincinnati, Hamilton and Indianapolis Railway Company but these Commissioners were not able to ascertain which but they think probably it is owned by the Cincinnati, Hamilton and Dayton Railway Company, though they hereby report that such owners name is unknown to them.

87 *Transcript.*

Property that will be damaged:
None.
Property that will be benefited:
The following property located on said Grand Avenue, between 9th and 11th Streets will be benefited in the amounts named.

On the West side of Grand Avenue.

Owned by John T. Wilkin, tract with frontage thereon of 169 5/10 feet, as Described in Town Lot Deed Record 12, page 43 of said County, benefited..... $19.70
Owned by Sabina Patton, Tract with frontage of 49 feet thereon, as described in Town Lot Record 13, page 216 of said County, benefited..... $5.72
Owned by William Bearly, tract with 33 1/3 feet frontage thereon as described in Town Lot Record 13, page 260 of said County, benefit..... $3.89
Owned by David W. McKee, Tract of 57.3 feet frontage thereon as described in Town Lot Record 10, page 388, of said County, benefit..... $6.68
Owned by Catherine Welsh, tract of about 60 feet frontage thereon, and being all the tract described in Town Lot Record 4, page 180 in said County, except the tract described in Town Lot Record 10, page 388, as owned by said David W. McKee, benefit..... $7.00
Owned by Carrie F. Theders, the part of Lot One (1) in Conwell's Northwest Addition to said City, fronting thereon that is described in T. L. Record 13, page 263 of said County, frontage 104 feet, benefit..... $12.09
Owned by David H. Showalter, Lots Two (2) and Three (3) of Conwell's Northwest Addition to said City frontage 165 feet, benefit..... $19.25

On East side of Grand Avenue as follows:

Owned by Francis T. Roots, real estate with 165 feet frontage thereon, as described in Town Lot Record No. 8, page 499 of said County benefited..... $19.25

Owned by Charles Winters, real estate with 40.5 feet frontage thereon, as described in Town Lot Record 7, page 546, of said County, benefit..... $4.73

88 *Transcript.*

Owned by Mary Heeb, real estate with 41.25 feet frontage thereon as described in Town Lot Record 8, page 562, of said County, benefit..... $4.82

Owned by Malinda Bertsch, real estate with 41.25 feet frontage thereon, as described in Town Lot Record 9, page 425, of said County, benefit..... $4.82

Owned by Heman Jones, real estate with 41.25 feet frontage thereon, as described in Town Lot Record 5, page 578, of said County, benefit..... $4.82

Owned by heirs of Henry Luking, to-wit: Mary Luking, Mary Luking, Jr., Josephine Luking, Katherine Luking, William Luking, and Francis Luking, real estate with 36 feet frontage thereon, as described in Deed Record 6, page 160, of said County, benefit..... $4.20

Owned by Theodore P. Heineman, Lot No. 6 (6), Block Three (3), of Conwell's North Addition to said City, frontage 118, feet benefit..... $13.78

Owned by John H. Rieman, Lots Five (5) and Four (4) Block Three (3), of Conwell's North Addition to said City, frontage 165 feet, benefit..... $19.25

That said Street as proposed to be open is simply an extension of Grand Avenue so as to make each meet under the said railroad embankment which tract is particularly described hereinbefore as the land to be appropriated.

We further report that no part of the expense of so opening said Grand Avenue should be paid by the City, except that of the Commissioners herewith reported.

All of which is respectfully submitted this 24th day of March, 1905.

JULIUS C. TURKENKOPH,
WILLIAM H. SHERRY,
WARD JEMISON,
S. O. McKENNAN,
WILLIAM T. EDWARDS,
Commissioners.

Fees:

S. O. McKennan..... $6.00
Wm. T. Edwards..... $6.00
Julius C. Turkenkoph..... $8.00
Ward Jemison..... $8.00
Wm. H. Sherry..... $6.00

Filed March 25-1905.

____ ____,
City Clerk.

89 *Transcript.*

Page 266.

Résolution.

Be it resolved by the Common Council of the City of Connersville that the report of the City Commissioners herein, filed March 25th, 1905, with the City Clerk in the matter of the opening of Grand Avenue under the Railway, between Ninth and Eleventh Streets, is hereby accepted, and the following described real estate, as described in said report shall be appropriated for the purpose of opening said Grand Avenue, to-wit: Part of the Southeast quarter of Section Twenty-four (24) Township Fourteen (14), Range Twelve (12), in Fayette County, State of Indiana, and described, All that tract of land occupied by the railroad embankment between 9th and 11th streets in the City of Connersville, that lies between the North and south ends of Grand Avenue as now opened and used and more particularly described as follows: Beginning at the Northeast corner of the end of Grand Avenue, north of Ninth, as now opened and used, and at the foot of said railroad embankment, and running thence North with the East line of said Grand Avenue extended a distance of Sixth-six (66) feet more or less to the South east corner of said Grand Avenue, as now opened and used on the North of said railroad embankment; thence West along the foot of said embankment and across the South end of said Avenue Sixth-six (66) feet more or less to the Southeast corner of said Avenue; thence South on the West line of said Grand Avenue extended sixty six feet more or less to the Northwest Corner of said Grand Avenue as now used and opened South of said railroad embankment and to the foot of said railroad embankment; thence Eastwardly across the North end of said Grand Avenue and with the foot of said railroad embankment Sixty six (66) feet more or less to the place of beginning.

And the said Clerk is hereby directed to deliver a certified copy of so much of said report as assesses benefits and damages and describes the said real estate so assesed to the treasurer of this City and said Clerk is directed to copy on the records of this Council said report in full and immediately following the record of the adoption of this resolution.

On motion of Lotz, on call of ayes and nays, the above resolution was adopted.

April 3rd, 1905.

The following objection was filed for the railroad Companies interested by their attorneys, Reuben Conner:

STATE OF INDIANA:

To the Mayor and Common Council of the City of Connersville, Indiana:

In the Matter of the Proposed Opening of Grand Avenue.

90 *Transcript.*

The Cincinnati, Hamilton & Dayton Railway Company, the Cincinnati, Hamilton and Indianapolis Railway Company and the Cincinnati, Indianapolis and Western Railway Company, (without in any manner waiving any objections that may be made by them to the proceedings heretofore or hereafter taken in relation to the proposed opening of Grand Avenue in the City of Connersville) take this method of making known to said Common Council the fact that they deny the right of the City of Connersville to impose upon them, directly or indirectly, the expense of constructing the necessary opening in the railroad bed, where it is proposed to open said Avenue, or the expense of constructing the necessary Bridge, Viaduct or other structure for the carrying of the railroad over said proposed avenue,—that upon the opening of said Avenue, across or under said railroad, it will become the duties of these Companies, or either of them, to construct such opening, or such bridge, viaduct, or other structure, then these Companies, and each of them, claim that there must be allowed to these Companies, (as part of the damages to the real estate abutting upon such proposed avenue due to the opening) the cost of constructing such opening and such bridge, viaduct or other structure, viz: The sum of $10,825, as shown by the following estimate:

Steel 14000# at 4¢ erected	$5600.
Mas. 490 Cu. yds. concrete at $7.50 including forms	3675.
Excavation in bank 2500 cu. yds. at 50¢	1250.
Excavation foundation 300 cu. yds. at $1.00	300.
Total	$10,825.

And proof is hereby offered of the correctness of the estimate aforesaid.

REUBEN CONNER,
Attorney for the Companies Named Above.

I, Jacob S. Clouds, City Clerk of the City of Connersville, Indiana, hereby certify that the annexed and foregoing transcript is a full, true and complete transcript of the proceedings of the Common Council of the City of Connersville, requesting and directing the meeting of the City Commissioners of said City, in the matter of the opening up of Grand Avenue, to which the annexed and foregoing proceedings relate, the notices given to the Cincinnati, Indianapolis and Western Railroad Company, the proceedings and report of the City Commissioners in said matter and the action of the Common

Council on said report, together with all entries and proceedings of said City Commissioners and said Common Council, that appear of record or on file in my office as such City Clerk, together with a copy or transcript of the notice and prayer of appeal on the part of
91 the Cincinnati, Indianapolis and Western Railroad Company in said proceedings.

Witness my name as such City Clerk, and the seal of said City, this 23rd day of May, 1905.

[SEAL.] JACOB S. CLOUDS,
City Clerk of the City of Connersville, Indiana.

Embankment When Built.

It is admitted by and between the parties to this suit, for the purpose of this trial, that the embankment mentioned in the proceedings of the Common Council of the City of Connersville, and through which the plaintiff in this case proposes to open Grand Avenue, was constructed for railroad purposes and a railroad track laid thereon by the predecessors of the defendant in this case, in the years 1869 or 1870; and that the railroad track has been maintained thereon continuously ever since that date, and is still maintained thereon.

But the plaintiff does not, by such admission, concede that such evidence is material in any way, or relevant evidence in the cause.

Def't's Railroad Extent.

It is admitted by and between the parties to this suit, for the purpose of this trial, that the railroad track of the defendant, under which the plaintiff proposes to establish a street, extends from the City of Hamilton, Ohio, to the City of Indianapolis, Indiana, and that such railroad track has been extended between said points by the defendant and its predecessors ever since said embankment was constructed.

But the plaintiff does not, by such admission, concede that such evidence is material in any way, or relevant evidence in the
92 cause.

Pl'ff Incorporated.

It is admitted by and between the parties to this suit, for the purpose of this trial, that the town of Connersville, which has been a town corporation for many years, became a city and was incorporated as a city during the year 1869, and was incorporated as a city under the general laws of the state.

But the plaintiff does not, by such admission, concede that such evidence is material in any way, or relevant evidence in the cause.

Extent of City When R. R. Built.

It is admitted by and between the parties to this suit, for the purposes of this trial, that at the time the railroad embankment in

question was constructed, that there was no part of the ground or land that lies north of said railroad embankment that is now within the corporate limits of the city of Connersville within the corporate limits of the then town or city of Connersville, and that the same was principally agricultural land, or land used for agricultural purposes.

But the plaintiff does not, by such admission, concede that such evidence is material in any way, or relevant evidence in the cause.

And the defendant, to maintain and support the issues on his behalf gave and introduced the following evidence.

C. S. Sheldon—Direct.

C. S. SHELDON, being the first witness called on behalf of the defendant, and being first duly sworn to testify to the truth,
93 the whole truth, and nothing but the truth relating to the above entitled cause, testified as follows:

C. S. Sheldon.

Examination in Chief.

Questions by Judge M. E. FORKNER:

Q. 1. You may state your name to the court and jury.
A. C. S. Sheldon.
Q. 2. Where do you reside?
A. In Cincinnati.
Q. 3. What is your business?
A. First Assistant Engineer of the C. H. and D. Railway.
Q. 4. How long have you been engaged in the business of engineering?
A. Something like sixteen years.
Q. 5. Did you take any preparatory studies and graduate at any technical school?
A. University of Michigan.
Q. 6. How long have you been engaged with the C. H. and D.?
A. About three and a half years.
Q. 7. Does the C. H. and D. operate the line that is here in controversy?
A. Yes sir.
Q. 8. State whether or not you have some experience in calculating and estimating the yardage of embankments, and cost of construction of different kinds in railroad work.
A. That is part of my duty.
Q. 9. How?
A. That sort of work comes under my duties with the Company.
94 Q. 10. And have you been engaged in that kind of work for the period you speak of?
A. I have, sir.

Q. 11. State whether or not you feel that you are competent to estimate the cost and value of work of that kind.

To which question the plaintiff objected, for the reason that it is not proper to ask an expert witness if he feels competent to do certain work or make estimates. But the Court overruled such objection. To which ruling of the Court the plaintiff excepted at the time.

Sheldon Direct.

A. Well, I take my money and have no scruples, is about as far as I can go.

Q. 12. Are you, in your employment are you acquainted with this particular line of this property physically?

A. Yes sir.

Q. 13. Do you know the situation that is in controversy here?

A. I do.

Q. 14. Have you seen it and examined it?

A. Yes sir.

Q. 15. Have you taken any measurements or made any observations as to the breadth of the fill at the point in question?

A. Yes sir.

Q. 16. How wide is it at the base? If you have any figures or any data you may refer to it.

A. (After referring to memoranda) From the bottom of the fill on one side to the bottom on the other side is actually one hundred and fifteen feet.

95 By Judge BARNARD:

Q. 17. That is going up over the bank, isn't it? I understand that transversely to the track.

By Judge FORKNER:

Yes sir.

Judge FORKNER, continuing examination:

Q. 18. How high is that embankment from the level of the ground, the base?

A. Fifteen feet to the base of the rail.

Q. 19. Now, how many cubic yards is there in that embankment, covering a distance of sixty-six feet along the track?

Sheldon Direct.

To which question the plaintiff objected. Thereupon the defendant withdrew such question.

Q. 20. About what is the slope of that embankment at the sides?

A. There are two slopes. The slope line is broken.

Q. 21. Describe that, just as nearly as you can, just describe it to the jury.

A. On top, at the base of the rail, the bank is eighteen feet wide, and twelve feet below this point the bank is sixty-five feet wide; fifteen feet below the base of the rail the bank is one hundred and fifteen feet wide.

Q. 22. Does this road, railroad, I mean, run immediately east and

west transversely across the proposed highway or street, or does it angle to some extent?

A. It does not cross the street at right angles.

Q. 23. Have you measured the actual distance that would be covered by the street passing the railroad?

A. I have not.

96 Q. 24. Have you any estimates?

A. We estimated that the diagonal distance is one foot greater than the distance squarely across the street.

Q. 25. That would make it, then, sixty-seven feet?

A. Sixty-seven feet.

Q. 26. Now, have you calculated the number of cubic yards of earth there is in that embankment for that distance?

A. Yes sir.

Q. 27. State the number of cubic yards that it contains.

A. Two thousand.

By Judge BARNARD:

Q. 28. How much?

A. Two thousand. That is inside of the proposed street, sixty-six feet.

By Judge FORKNER, continuing examination:

Q. 29. What is the nature of that embankment as to being solid or otherwise, or permanent?

A. It is a very good bank, very solid bank.

Q. 30. What would be the value of the two thousand cubic yards contained in that embankment, just as it now is, and used for railroad purposes as it now is used in connection with that railroad.

Sheldon Direct.

To which question and the evidence sought to be elicited, the plaintiff objected, upon the ground that it is entirely immaterial as to what may be the value of the earth as a support for the railroad track; and that the only question involved in this case is the value of the real estate that is to be appropriated by the opening up of the street, and that the value of the earth as a support for

97 the railroad is in no way in issue in this case.

But the court overruled such objection. To which ruling of the court the plaintiff excepted at the time.

A. I would say about fifteen thousand dollars.

Q. 31. I do not know whether you understand the question or not—Now, what would it be worth if that section was cut out there and it was proposed to replace it with earth, what would it be worth to replace it with earth?

Sheldon Direct.

To which question and the evidence sought to be elicited the plaintiff objected, upon the ground that it would not be necessary, if the street is opened up to fill it again with earth, and that it can form no proper measure of damages in this case; and that the only question involved is the value of the real estate to be appropriated.

Thereupon the defendant withdrew such question.

Q. 32. State what it would be worth to construct that embankment there as it is now per cubic yard.

To which question and the evidence sought to be elicited the plaintiff objected, upon the ground that the question calls for a matter in no way involved in the issues of this cause.

The defendant offers to prove by the witness that the witness will testify in answer to the question that to construct the embankment alone, disconnected from other considerations, that it would be worth from sixty to seventy-five cents per cubic yard; and
98 the defendant offers to prove this is an element, a distinct element, going to the question of the value of the material that is to be taken away from the defendant in this case.

But the court sustained such objection. To which ruling of the court the defendant excepted at the time.

Q. 33. Suppose that this street should be cut through there, and that embankment should be cut and carried away, leaving nothing but the rails and the ties without support, then what would the material of that embankment be worth?

To which question and the evidence sought to be elicited the plaintiff objected, for the reason that it is asking for an impossible state of affairs, because the railroad ties would not stay
Sheldon up there if there was nothing under them; and upon the
Direct. further ground, because there is no question in the cause to which such evidence would be material, and that it can in no way throw any light upon the value of the real estate to be appropriated by opening up the street at the point in question.

But the court overruled such objection. To which ruling of the court the plaintiff excepted at the time.

A. I presume you mean——

Q. 34. You take the material and you cut it away, what would it be worth, if anything?

A. It would not be worth anything.

On cross-examination the said witness testified as follows,
99 the cross-examination being conducted by David W. McKee, Esq.:

Cross-examination:

Q. 35. Mr. Witness, do you say that earth would be worth nothing? Wouldn't it make a good fill somewhere?

A. It would be worth nothing to the railroad company.

Q. 36. How is that?

A. It would be worth nothing to the railroad company.

Q. 37. Nothing to the railroad company—Then, you mean to say simply if that earth was not there is would not be worth anything to you,—to the railroad company?

Sheldon A. No sir.

Cross-ex. Q. 38. Do you know the cost of the removal of earth or excavations, especially of the removal of earth when it is on the top of the ground?

A. No sir.

Q. 39. You do not know what the cost per cubic yard would be?
A. No sir.
Q. 40. Have you any knowledge of what the cost per cubic yard is, or would be, of building a fill of the nature of the one you have spoken of?
A. Yes sir.
Q. 41. You know the price of teamsters there in that neighborhood, do you?
A. No sir.
Q. 42. Then you don't know what the price of a team per day in the City of Connersville is?
A. No sir.
Q. 43. Do you, or do you not, know where material suitable for building such an embankment as that in that vicinity can be had?
A. Yes sir.
100 Q. 44. Where?
A. Well, we have got a gravel pit in Connersville, and we could strip that gravel pit.
Q. 45. How far is that gravel pit from this location?
A. Probably one hundred and sixty rods.
Q. 46. One hundred and sixty rods?
A. Yes sir.
Q. 47. And there is abundant material, then, within one hundred and sixty rods of this location for building such a fill?
A. Yes sir.
Q. 48. Have you any knowledge as to what that material is worth per cubic yard?
A. Yes sir.
Q. 49. Do you know what the railway company is paying,—that is paid for that kind of material you speak of in the gravel pit, per cubic yard?
A. No sir.
Q. 50. You know that within the last few years the railway company bought, within about one hundred and sixty rods of this place, several acres of land from Mr. Roots, don't you?
Sheldon X A. Yes sir.
Q. 51. You don't know what the price per cubic yard was?
A. No sir.
Q. 52. Don't you know that the price per cubic yard was not more than three cents a yard?
A. No sir. I do not know anything about that.
Q. 53. You don't know about that?
A. We didn't buy it by the cubic yard.
Q. 54. You just bought the whole thing by the acre?
A. Yes sir.
101 Q. 55. Now, if you don't know the price of teams, and you don't know *that* it would cost the railroad company per cubic yard, how do you know what the value of the fill would be?
A. I do not know.
Q. 56. You don't know?

A. No sir.

Q. 57. Now, you say that one hundred and fifteen feet. Didn't you measure out into the open street quite a distance and past the ends of the sidewalks?

A. Well, that bank has been there a long while, and it has spread out considerable.

Q. 58. Don't you know that the sidewalks on the west side run right up to the embankment from the south?

A. Yes sir.

Q. 59. And don't you know that from the north the sidewalks come up to the foot of the embankment?

A. I do not remember about that.

Q. 60. You don't remember about that?

Sheldon X. A. No sir.

Q. 61. You do know that on the south they did?

A. Yes sir.

Q. 62. And don't you know that on the one hundred and fifteen foot base that you have gone back into the street quite a distance past the ends of the sidewalks?

A. No, I cannot say that.

Q. 63. You cannot say as to that. Will you say that you did not?

A. I did not say whether I did or not.

Q. 64. Now, I will ask you if, on the right of way of this railroad company, to the west at a cut, within not more than
102 four or five squares, if there is not material there, loads of it?

A. How far.

Q. 65. Oh, some four or five or six squares to the west.

A. Why, yes, there is material there.

Q. 66. Then, as a matter of fact, there is material, and on the railroad ground, within some from four to ten squares west of it?

A. Yes, there is material.

Q. 67. Now, do you know, by teams, without the use of steam shovels nor railways, do you know what it costs to excavate a cubic yard of earth in Connersville?

To which question and the evidence sought to be elicited, the defendant objects, upon the ground that counsel now is proving what it would take to carry dirt to this place, but declined to ask the witness what it is worth on the embankment, or what it would cost to cut and haul it away.

Sheldon X.

But the court overruled such objection. To which ruling of the court the defendant excepted at the time.

A. No, I do not.

Q. 68. Do you know, if that embankment were removed, what it would cost to replace one, to build one, right alongside of it, the same size and height?

A. No sir.

Q. 69. And isn't it a fact that your estimate of what it is worth

is built up of what it would cost to make a steel bridge to run over the same ground, and the abutments?

103 A. I am free to confess that is my idea of it.

Q. 70. And under cover of a bank of dirt you are then willing to swear that the dirt is worth fifteen thousand dollars?

A. I am, yes.

Q. 71. And I believe you said you didn't have any scruples about drawing your money. Do you have any scruples about the truth of your testimony?

To which question the defendant objected, upon the ground that it is asked merely for the purpose of badgering the witness.

And the court sustained such objection. To which *Sheldon.* ruling of the Court the plaintiff excepted at the time.

Q. 72. Don't you know Mr. Witness, that that bank, the whole of it, every part of it, can be built for less than five hundred dollars right where it is now?

A. No sir.

Q. 73. You do not know that?

A. No sir.

Q. 74. Do you say that it could not be?

A. Yes sir.

Q. 75. You do?

A. Yes sir.

Q. 76. You say that there are two thousand cubic yards there?

A. Yes sir.

Q. 77. And a good deal of this is off on the traveled street, too, isn't it?

A. It departed there from our bank.

Q. 78. How?

A. It slipped from our standard bank.

104 Q. 79. Your bank would in no way be affected, its solidity nor stability, by being cut level with the street to the end of the sidewalk, would it?

A. I don't believe I understand you.

Q. 80. If the street was made perfectly level as far north and as far south as the sidewalks extend, as far as the street extends, leveling that would not weaken your bank, would it, cutting in that far?

A. No, I don't think it would.

Q. 81. Now, do you or do you not, know that good filling earth and gravel can be excavated and moved for as great a distance as would be necessary to go for material for this bank, for twenty-five cents per cubic yard?

A. Excavated only.

Q. 82. Excavated and hauled and thrown in position?

A. No sir.

Q. 83. You think it could not be done?

A. No sir.

Q. 84. And yet you confess that you do not know what *Sheldon.* the hauling would cost?

A. Yes sir.

Q. 85. How?

A. I did confess it.

Q. 86. Do you, or do you not know that with the railroad company's facilities, the removal of the earth or the building of a fill could be accomplished much cheaper than it could by wagon and team?

A. You mean out of a bank or our of our fill?

Q. 87. Out of a bank.

A. Oh, yes, I think so.

Q. 88. Much cheaper?

A. Yes. It would depend somewhat upon the amount of
105 earth to be handled.

Q. 89. Do you know how many cubic yards can be hauled on one gravel car?

A. About ten yards on a flat car, twenty-five yards, twenty to twenty-five yards on a dump car.

Q. 90. Ten on a flat and about twenty-five on the dump?

A. Yes sir.

Q. 91. As to the exact width of this fill, beginning at the north end of South Grand Avenue and the south end of North Grand Avenue, you cannot say just what the width is through, can you?

A. No, I cannot.

Q. 92. I believe you say it is some fifteen feet from
Sheldon. the rails to the level of the street bed below?

A. Yes sir.

Sheldon—Re Ex.

Redirect examination.

Questions by Judge M. E. FORKNER:

Q. 93. Now you may state if you, in making the estimate of the value of that fill there, whether you calculated and estimated the necessary cost of reconstructing a crossing there, in case of its removal?

A. I did, sir.

Q. 94. Now, state to the jury the different elements that you considered and the amount of them, making up the twelve thousand or fifteen, whatever you say it is.

To which question and the answer sought to be elicited the plaintiff objects, upon the ground that the witness has admitted that he has made up his estimate of the value of the earth by an estimate of what it would cost to construct something else across it, the
106 abutments across and the steel bridge or whatever it might be. Upon the further ground that it is not proper and it is not the law, and they have no right to put a witness upon the stand who is willing to value a pile of dirt at, not what it is worth, but at the cost of stone abutments, steel girders and a steel bridge put there. There is nothing plainer than it is simply a concocted scheme, by which counsel is seeking to get before the jury what it

would cost to build a bridge, which the law says they shall build and not the people.

By the COURT: I think the witness would have a right to explain what he took into consideration.

The Court overruled such objection.

Sheldon Thereupon the plaintiff withdrew such objection.

Re. Ex. Thereupon the defendant withdrew said question.

And further this witness saith not.

And here, at the hour of 5:00 o'clock P. M., court adjourned until tomorrow morning, October 16, 1906.

Tuesday, October 16th, 1906.—Court met pursuant to agreement, and the further hearing of the above entitled cause was resumed.

J. W. STEARNS, called as a witness on behalf of the defendant, and being first duly sworn to testify to the truth, the whole truth, and nothing but the truth relating to the above entitled cause,
107 testified as follows:

Stearns—Direct.

Examination-in-Chief.

Questions by Judge M. E. FORKNER:

Q. 1. State your name to the Court and jury.

A. J. W. Stearns.

Q. 2. Where do you reside, Mr. Stearns?

A. Indianapolis.

Q. 3. What is your business?

A. I am a civil engineer.

Q. 4. How long have you been engaged in the business of civil engineering?

A. Nineteen years.

Q. 5. And in what particular employments have you been engaged?

A. Railroad construction.

Q. 6. For what companies?

A. The Lake Shore and Michigan Southern, Rock Island, and Pacific, New York, New Haven and Hartford, Western Elevated, and Big Four.

Q. 7. Are you engaged in any railroad service?

A. I am an engineer and superintendent for a contracting firm in Indianapolis.

Q. 8. State whether you have seen or know of the situation that is in controversy here at Connersville.

A. I have been over the ground there at Connersville.

Q. 9. State whether or not you are acquainted with railroad values in Indiana, and of railroad beds for railroad purposes, if you have any knowledge of values of that kind.

A. I have.

Q. 10. Now, taking the ground that would be occupied by this

proposed highway, say sixty feet square, with the embank-
108 ment that is upon it, in its condition as it now is, what, in your judgment is that ground and embankment worth for railroad purposes?

To which question and the answer sought to be elicited the plaintiff objects, upon the ground that in these proceedings in no legal sense is the land of the railroad company being taken, and no evidence is competent as to what is the value of the land; the plaintiff objects to the question and the answer sought to be elicited, upon the further ground that if the land is being taken and if its value is competent to be proven, it has to be proved by the fair market value. But the court overruled such objection. To which ruling of the court the plaintiff excepted at the time.

Stearns Direct.

A. About fourteen thousand dollars.

Cross-examination.

Questions by DAVID W. MCKEE, Esq.:

Q. 11. Mr. Witness, are you acquainted with real estate values in the City of Connersville?

A. I am not.

Q. 12. I believe it was sixty-six feet square you spoke of, that land?

Stearns. A. Those are the figures they gave me.

Q. 13. That is what you answered too, wasn't it?

A. I answered yes.

Q. 14. Did you ever make a calculation as to what the C. H. and D. Railroad is worth at that valuation, fourteen thousand dollars for sixty-six feet there, through the City of Connersville?

109 To which question and the answer sought to be elicited the defendant objected, upon the ground that it is *is* a matter of calculation. But the Court overruled such objection. To which ruling of the court the defendant excepted at the time.

A. Five thousand two hundred and eighty divided by sixty six——

Q. 15. How?

A. Divide five thousand two hundred and eighty by sixty-six, and multiply the fourteen thousand dollars by the resulting figures.

Q. 16. You have not computed?

A. No sir.

Q. 17. What do you think? Two or three million dollars?

A. No sir.

Q. 18. You don't think it would?

A. No sir.

Q. 19. You are a mathematician, I believe?

A. I think so.

Stearns. Q. 20. Tell us what a mile of that railroad would be worth.

To which question and the answer sought to be elicited the defendant objects, upon the ground that counsel on cross-examination asked the witness how the calculation should be made, and the witness has testified, and that he has no right to require the witness upon the stand to make figures for him; and the defendant further objects to the question and the answer sought to be elicited, upon the ground that the evidence is only in the nature of an argument, and that the figuring can be made by any gentleman who has ever been educated to the simple Rule of Three; and the defendant further objects to the question and the answer sought to be elicited, upon the ground that it assumes that the railroad through Connersville is all an embankment just like this.

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But the court overruled such objection. To which ruling of the court the defendant excepted at the time.

A. One million, one hundred and twenty thousand.

Q. 21. Do you know how much of that railroad is on an embankment of that height in and through the city of Connersville?

A. I do not.

Thereupon the defendant objects to the question and moves the court to strike from the record the answer of the witness, upon the ground that the testimony is wholly irrelevant and immaterial to any of the issues in this cause.

Stearns.

And the court sustained such objection and motion. To which ruling of the court the plaintiff excepted at the time.

Q. 22. You say you do not know anything about real estate values in Connersville?

A. I do not.

Q. 23. About how high is this fill?

A. About fifteen feet.

Q. 24. Did you measure it?

A. I did not.

111

Q. 25. You didn't even measure it?

A. I did not.

Q. 26. When did you measure it?

A. I was there on the Fourteenth of November.

Q. 27. Fourteenth of this month?

A. Yes sir.

Q. 28. Who was with you?

A. I was alone.

Q. 29. Was anyone talking with you about what the value of this sixth-six feet would be?

A. No sir.

Q. 30. Councel never asked you what it would be worth?

A. I do not understand your question.

Q. 31. Was anyone talking with you about what the value of this sixty-six feet would be?

A. Nobody had talked to me previous to my going to Connersville.

Q. 32. But previous to your examination had you been talked to as to what would be the value of this?

Stearns.

A. I was asked to give my opinion as to what the values were.

Q. 33. Did anyone state to you what items you should take into consideration?

A. They did not.

Q. 34. Well now, about how many—the way you have computed this, about how many cubic yards of earth are in the embankment?

A. In the neighborhood of about nineteen hundred yards.

Q. 35. Do you know anything at all of what is the market value of earth there in the city of Connersville, for filling?

112 A. No sir, I do not.

Q. 36. Do you know what it costs to excavate and haul earth for say a quarter of a mile and deposit it there in the city of Connersville?

A. I could take the general run of work.

Q. 37. But do you know there in Connersville?

A. I cannot say just as to Connersville. I never have done any work in Connersville, never figured on any work in Connersville.

Q. 38. Have you any knowledge at all as to how close to this place earth for filling purposes can be conveniently obtained?

A. There are places probably within——

Thereupon the defendant objected to this question and moved the court to strike from the record the answer of the wit-

Stearns.

ness, upon the ground that it is not proper cross-examination; and the defendant further objects to the question and moves the court to strike the answer of the witness from the record, upon the ground that there is no pretense of anybody desiring, intending or purposing to haul dirt to this grade or this point, and the question is wholly immaterial and not proper. But the court overruled such objection. To which ruling of the court the defendant excepted at the time.

A. There are places within two thousand feet where material can be gotten to make a fill, to be handled by work trains.

Q. 39. Have you ever made any computation as to what it is worth to build an embankment fifteen feet high, eighteen

113 feet across at the top, sixty-six feet long, at a location where the filling material can be obtained within two thousand feet?

A. I have.

Q. 40. About what would be the cost of that?

A. To build a green embankment,—by green I mean an embankment that is not compact in any way—and to make it with a steam shovel, would cost between thirty-five and forty cents a yard. Of course there are so many other things that enter into that. You have got to figure on the number of your trains that are using the main line.

Q. 41. It would probably cost a little more by wagon and team, I reckon, of course, than it would by using the track?

Stearns. A. Now, then, another question comes in. Do you want me to consider that fill in particular or any fill?

Q. 42. Any fill in that locality where there is material that can be obtained within the distance it can there.

A. That particular fill I don't think could be made by teams, not economically, because there is no chance to drive, there is no roadway.

Q. 43. You mean on account of the fact of the railroad being there?

A. Yes sir.

Q. 44. And I suppose it is a little high to reach well by teams?

A. There is no chance for a man to make a runway to drive up and dump and then return.

Q. 45. It could be done by building a runway, I suppose?

A. Of course.

114 Q. 46. You say thirty-five or forty cents in the embankment?

A. Yes sir.

Q. 47. I didn't know whether I quoted you right or not.

A. Between thirty-five *or* forty cents.

Q. 48. Mr. Witness, in putting the value on the embankment, did you put the value with reference to what it would cost to make it, or did you take into consideration what it would cost to put a steel bridge there?

A. I figured on putting something in the place of that embankment that was equally good, that would answer the purposes nearly as possible.

Q. 49. What was the something that you figured on in putting in its place?

A. We figured on a steel structure.

Q. 50. And then, in putting a value on this, instead of putting it on the sixty-six feet of farming dirt or of the amount what it would cost to build the fill you made up your opinion upon what a steel bridge, with abutments and all fixed would cost, to put it in condition to run the road just as well as the dirt?

Stearns.

A. Put it in condition that would answer the same purpose as the embankment does today.

Q. 51. Have you the items out of which you made this estimate?

A. I have.

Q. 52. Well now, just tell the jury what the items were that you took into consideration.

A. Well, we begin with a temporary structure to carry the track.

Q. 53. That is while the work is going on?

A. While the embankment is being removed.

115 Q. 54. That was how much?

A. That figured at thirteen hundred dollars.

Q. 55. That is the temporary structure to hold the track while the work is being carried on?

A. While the embankment is being removed.

Q. 56. Thirteen hundred?

A. Yes sir.

Q. 57. What next?

A. Then we have to excavate for the foundation for the abutments to carry the steel structure.

Q. 58. What have you to excavate for abutments?

A. Three hundred dollars. Then the concrete for the abutments, thirty-three hundred dollars.

Question by Mr. CONNER:

Q. 59. How much?

Stearns. A. Thirty-three hundred. For the steel structure itself, six thousand dollars?

Q. 60. Six thousand?

A. Yes sir. Then in building the abutments we necessarily have to take out some of the embankment back of the street line and replace that. That I figure would cost one hundred and thirty-five dollars.

Question by Mr. MCKEE, continuing examination:

Q. 61. Yes, go on.

A. Then there is the cost of removal. I will have to figure that up to see exactly.

Q. 62. We are not particular as to the exact amount.

A. I think that figures up about fifteen thousand dollars.

Question by the COURT:

Q. 63. Did you state the cost of removing the embankment?

116 A. I have not figured at all the cost of removing the embankment. (Referring to memorandum book.) Yes, here it is. I have overlooked it. That is twelve hundred and eighty-eight dollars.

Question by ME. MCKEE, continuing examination:

Q. 64. You took that in also?

A. Yes sir.

Q. 65. Twelve hundred and eighty-eight dollars to remove nineteen hundred cubic yards of earth?

A. I said nineteen hundres yards of earth in your sixth-six feet, but you cannot make a soft embankment stand on a straight slope, you have a good deal of excavation back of the street

Stearns. lines.

Q. 66. Excavation back of the street lines?

A. Back of the abutments.

Q. 67. Well, how many cubic yards did you estimate, all told, in your account as to being removed?

A. About twenty-six hundred yards.

Q. 68. About twenty-six hundred yards?

A. Yes sir.

Q. 69. You think it would cost twelve hundred and eighty-eight dollars to remove twenty-six hundred yards of earth from there?

A. I do under the conditions that would be there.

Q. 70. Do you know what it costs to dig out from below, not on top, do you know what it costs to excavate per cubic yard in Connersville?

A. I never did work in Connersville. I never have done any work in Connersville. I am judging from my experience in other places.

Q. 71. Don't you know that earth can be excavated, not as I say, off the top of the ground, but dig it from below, and removed
117 there for about twenty-five cents per yard?

A. No sir.

Q. 72. Hauled away and dumped over the embankment over there towards East Connersville?

A. I do not know the conditions there, but you must understand that you have got something more than a plain embankment there. You have got that embankment punched full of piles for the temporary structure to carry the road over, and I can state
Stearns. it would be very difficult to get in there to work. You cannot drive your teams there.

Q. 73. You know nothing to hinder them when they had excavated and reached the bottom to saw them off?

A. Yes, but what is going to carry your track?

Q. 74. So you have computed in this value of that bank, you have computed all that it would cost to remove the earth and the piling, and put up a temporary structure, put up abutments, and remove the dirt behind the abutments and refill, and put up a steel structure so as to have a good working railroad crossing; you have computed that all in the value of this embankment, have you?

A. I have.

Stearns—Redirect.

Redirect examination.

Questions by Judge M. E. FORKNER:

Q. 75. Now, you speak here of building a green embankment, and it would cost about thirty-five or forty cents. Is there, or is there not, a difference in a green embankment, and one that has been made for twenty-five, thirty or forty years?

A. A vast difference.

Q. 76. Now, explain to the jury in your own way, now,
118 the difference there would be between those embankments, and the difference between the cost and the value of them.

A. Well, a green embankment we consider, is one that has not been run over, where the material is simply dumped onto the ground and packed by its own weight only, while a packed embankment is one that has been run over, where the particles of earth are all consolidated therein. The earth is packed together the same way that you would take a pail of sand, and if you pound it you can get a great deal more sand in the pail after you pound it than before, and the same way with an embankment. It has been pounded down, and it takes a great many years to do that, in fact, in some cases it will take from twenty to thirty years before your embankment

becomes a solid mass, before it ceases to give under a load passed over it.

Stearns Redirect.

Q. 77. Now, to build a green embankment—In this settling and packing, now, does that involve an additional expenditure of more material?

A. It means that every time the embankment has settled *to* that it is not safe for traffic, why, fresh material has to be hauled on and the grade raised up to its true condition.

Q. 78. And then, take the ballasting. Do you know to what height the road is ballasted there at that point, or how deep the ballast is on top, the gravel?

A. At that particular point, No sir, I do not. I suppose eight to ten inches below the ties.

Q. 79. The cost of ballasting, is that more or less than ordinary filling?

A. Ballasting costs more than ordinary filling.

Q. 80. Now, suppose that you were going to cut through
119 there and remove that embankment, what would be necessary, what kind of a structure would be necessary in the progress of that work, considering that there are six or eight trains running each way, passenger trains and freight trains, passing over the road, a single track that would have to be maintained all the time in active service?

To which question and the answer sought to be elicited the plaintiff objected, upon the ground that it is inquiring about a matter that cannot be taken into consideration on a question of damages in this case, that the defendant is required to make its crossings and keep them safe, and that, whether temporary, or permanent, the nature, character or expense could not be a proper matter to be considered by the jury.

Stearns Redirect.

By the COURT:

At this time it seems to me that this embankment might be considered a structure for which the defendant might be compensated for its removal. Now, upon that theory it seems to me that what it would cost, the cost of the removal is a proper element that might go before the jury.

The Court overruled such objection. To which ruling of the court the plaintiff excepted at the time.

A. The first thing that would be necessary to do would be to drive piles across where the opening is to be made, back on either side, so that the banks could be sloped down to back of the street line, providing for the necessary excavation for a permanent
120 structure. These piles would be cut off below at a sufficient depth so as to provide stringers and caps, bringing the stringers to the base of the ties as they would stand. That being done, you would go in and excavate the embankment, taking the embankment out and carrying it away.

Q. 81. Is that the structure that you testified that you would estimate would cost thirteen hundred dollars?

A. That is the structure that I estimate would cost thirteen hundred dollars.

Q. 82. And what is it you estimate for concrete?

—. Thirty-three hundred dollars, I believe. I have got the figures here. Where is that to be placed?

Stearns Redirect.

To which question and the answer sought to be elicited the plaintiff objects, upon the ground that it is not material as to where any of the concrete might be placed, or as to what it would cost, because it is an item upon which there could be no legal allowance by way of damages.

By the COURT:

The objection will be sustained as to the question as going to the liability of the city to pay for it. It will be admitted simply for the purpose of showing what it is for.

The Court overruled such objection. To which ruling of the court the plaintiff excepted at the time.

Q. 83. No, then, you may state the use of that concrete—what it is used for.

A. It will be used for the foundations and for the abutments to carry the abutments to be placed on each street line.

121 Q. 84. Have you figured a concrete abutment, not using any stone?

A. A concrete abutment.

Q. 85. And that thirty-three hundred dollars includes the whole thing?

A. This includes the whole thing.

Q. 86. Now then, the six thousand dollars for steel, I presume that is the steel overhead structure?

A. The steel overhead structure.

Q. 87. You may state to the jury what kind or weight of steel structure you have figured on.

A. We have figured on a three-girder construction, weighing about one hundred and forty thousand pounds.

Q. 88. A single span?

A. No, a three-span structure, similar to that already at Central Avenue.

Q. 89. Now, state to the jury the relative value between an embankment of the size of this that has been made and settled for say twenty-five years, and one newly made; not in dollars and cents, but can you give the proportion?

Stearns Redirect.

To which question and the answer sought to be elicited the plaintiff objects, upon the ground that such opinion can in no wise throw any light upon the issues in this case and is wholly immaterial.

The defendant offers to prove by the witness and the witness will testify in answer to the question, that an embankment of this character, after it is made and has settled for a period of about twenty-five

years and has become thoroughly settled, and the road
122 ballasted, it would be at least double the value of an embankment newly built.

The court sustained such objection. To which ruling of the court the defendant excepted at the time.

And further this witness saith not.

Act of Incorporation.

The defendant offers in evidence the first three sections of an Act of the Legislature incorporating the Junction Railroad Company, passed in Eighteen hundred and Forty-eight, as appears in the special acts published by the state, and authenticated by the certificate of the Secretary of State.

The plaintiff interposing no objection to the introduction of the act of the Legislature in question, the same were introduced and read in evidence by the defendant, and here follows:

123 *Act of Incorporation.*

"An Act to Incorporate the Junction Railroad Company.

SECTION 1. Be it enacted by the General Assembly of the State of Indiana, That Jefferson Helm, Alfred Posey, Horatio G. Sexton, and Daniel Wilson of the county of Rush; Wm. Russell, George Frybarger, Daniel Hankins, Wm. Tindel, Samuel W. Parker, Henry C. Moore, and Henry Simpson, of the county of Fayette; Henry Langston, John B. Rose, John Norris, Ambrose Reuby, William Bennett, Charles Nutter, John Yargan, Samuel Ridenour, and Benjamin Miller, of the county of Union, their associates and successors, be and they are hereby constituted a body corporate, and shall be and remain such forever, under the name of "The Junction Railroad Company," and by that name said company may contract and be contracted with, sue and be sued, and do all other things proper and usual for similar companies to do: And they are hereby invested with all the powers and privileges, in any wise necessary or expedient to carry into effect the proper business of the association.

SEC. 2. Said company is created with a view to the construction of a railroad, with all usual or desirable appendages, to connect the railroad now in progress from Rushville to the Madison and Indianapolis railroad, in this state, with the railroad now in progress from Hamilton to Cincinnati, Ohio. And said railroad shall be extended from Rushville, through Connersville, on what may be deemed the best route to the most eligible point on the line between the States of Indiana and Ohio. And with the sanction of the State of Ohio this company shall have the same powers and privileges for the extension of said road through Oxford to Hamilton, in said state, as it may or can have under the provisions of this charter were the whole line within this state. And it shall be lawful to merge in this company, under this charter, either or both of the companies

now engaged in constructing the railroad from Rushville,
124 through Shelbyville, to the Madison and Indianapolis railroad on such terms as the companies directly interested may agree upon through their respective boards.

SEC. 3. For the purpose of constructing said road, with all desirable appendages, and for putting and keeping the same in repair, and for doing all proper business thereon, said company *are* hereby authorized to enter upon, take and hold in fee simple all real estate and materials desirable for that purpose, doing no unnecessary damage."

Not in Corporation When Built.

It is admitted by the plaintiff in this case for the purpose of this trial, that the territory on which the embankment of that part of the railroad is in question in this case was constructed and trains being operated thereon before that territory was taken into the corporate limits, either of the town or the city of Connersville.

Def't's Rights from Conwell.

It is admitted by the plaintiff in this case for the purpose of this trial, that whatever rights, if any, the Junction Railroad Company obtained in the first instance for the land in question in this case was obtained from Abraham B. Conwell, the said Abraham B. Conwell at the time owning said land in Fee simple.

RICHARD N. ELLIOTT, called as a witness on behalf of the defendant, and being first duly sworn to testify to the truth, the whole truth and nothing but the truth relating to the above entitled cause, testified as follows:

125 *Elliott—Direct.*

Examination-in-chief.

Questions by REUBEN CONNER, Esq.:

Q. State your name to the court and jury.
A. Richard N. Elliott.
Q. 2. Where do you reside?
A. Connersville, Indiana.
Q. 3. What is your business?
A. I am a lawyer.
Q. 4. You are city attorney of the City of Connersville at this time, are you?
A. Yes sir.
Q. 5. How long have you lived in Connersville, Indiana?
A. About eleven years.
Q. 6. How?
A. About eleven years.
Q. 7. Are you acquainted with the defendant's railroad are you, that passes through Connersville?
A. Yes sir.

Q. 8. Do you know, Mr. Elliott, how many passenger trains a day is now operating and has been operating each way through the city of Connersville over its road?

To which question and the answer sought to be elicited the plaintiff objected, upon the ground that it is immaterial to any of the issues of this cause; and the plaintiff objects to the question and the answer sought to be elicited, upon the further ground that it is not proven that the witness has any knowledge as to who is operating that road.

Thereupon the defendant withdrew such question.

126 Q. 9. State, if you know, Mr. Elliott, how many trains are now, or have been for the last year, operated,—that is, how many passenger trains each way over the road in question, the railroad in question, through the City of Connersville?

To which question and the answer sought to be elicited the plaintiff objects, upon the ground that it is wholly immaterial to any of the issues in this case. The defendant railroad company, if it owns the railway or operates it, and known as the party interested in the case, is subject to the law, and the law is the same, whether there be many or few trains, and the evidence cannot throw any light upon the question at issue, or the measure of damages.

Elliott Direct.

The defendant states to the court that it offers to prove by the witness and the witness will testify in answer to the question that there has been, during the past year, six passenger trains passing over this part of the road in question in this case daily.

The court sustained such objection. To which ruling of the court the defendant excepted at the time.

Q. 10. State, Mr. Elliott, if you know, how many freight trains are now being operated, and have been operated during the last year over the railroad in question in this case daily.

To which question and the answer sought to be elicited the plaintiff objects, upon the ground that it is wholly immaterial to
127 any of the issues in this case. The defendant railroad company, if it owns the railway or operates it, and known as the party interested in the case, is subject to the law, and the law is the same, whether there be many or few trains, and the evidence cannot throw any light upon the question at issue, or the measure of the damages.

Elliott Direct.

The defendant states to the court that it offers to prove by the witness and the witness will testify in answer to the question, that there is now being operated, and has been at all times during the last year, as many as ten freight trains each way daily over the portion of the railroad in question.

The court sustained such objection. To which ruling of the court the defendant excepted at the time.

And further this witness saith not.

Def't Rests.

And here the defendant rested its cause.

McKennon—Direct.

S. O. McKENNON, called as a witness on behalf of the plaintiff, and being first duly sworn to testify to the truth, the whole truth, and nothing but the truth, relating to the above entitled cause, testified as follows:

Examination-in-chief.

Questions by DAVID W. McKEE, Esq.:

Q. 1. You may state your name to the court and jury.
A. S. O. McKennon.
Q. 2. Where do you reside?
128 A. Connersville.
Q. 3. About what is your age?
A. Fifty-two years.
Q. 4. What is your occupation?
A. Druggist.
Q. 5. In what part of the City of Connersville do you reside?
A. I live at 1105 Central Avenue, the second lot above Eleventh Street North.
Q. 6. How far is that location from the Grand Avenue and C. H. and D. Crossing?
A. About two blocks.
Q. 7. Would this crossing have, in any way anything to do with the street on which you live?
A. No sir.
Q. 8. You own real estate in the city of Connersville?
A. Yes sir.
Q. 9. Are you acquainted with the market value of real estate in that portion of the city in which you reside and where this crossing is?
McKennon Direct.
A. Yes I think I am.
Q. 10. You may state to the jury what sixty-six feet square of real estate at the crossing of the C. H. and D. Railroad and Grand Avenue, just the bare earth, without improvement or embankment, the sixty-six feet square of real estate in that vicinity would be fairly worth, a fair market value.
A. Well, that would depend a little on whether a person was going to value it for his own personal use or for public use. I consider the ground for private purposes is more valuable than for public purposes.
Q. 11. About the fair cash market value?
129 A. Well, I think a fair market value of that ground as it is located would be one hundred and fifty dollars.

Cross-examination.

McKennon. Questions by REUBEN CONNER, Esq.:

Q. 12. Mr. McKennon, you were one of the City Commissioners that made the assessment of damages and benefits in the opening up of Grand Avenue, the contention in this case, were you not?

A. Yes sir.

Redirect-examination.

Questions by DAVID W. MCKEE, Esq.:

Q. 13. Who were the other Commissioners. There is one I think I have forgotten his name?

McKennon. A. Why, there were myself, Mr. Ward Jemison,——

Q. 4. He is dead?

A. Yes sir. William H. Sherry.

Question by Mr. CONNER:

Q. 15. Mr. Heeb, I guess, was one, wasn't he?

A. Yes, Mr. William Heeb.

Question by Mr. MCKEE:

Q. 16. Are you sure he was one?

A. I think Mr. Heeb was one. That is the one I could not remember.

And further this witness saith not.

And here, at the hour of 11:15 o'clock, a. m. court took recess until 1:30 o'clock p. m.

Court met at 1:30 o'clock, p. m.

130 J. C. TURKENKOPH, called as a witness on behalf of the plaintiff, and having been first duly sworn to testify to the truth, the whole truth, and nothing but the truth relating to the above entitled cause, testified as follows:

Turkenkoph—Direct.

Examination-in-chief.

Questions by DAVID W. MCKEE, Esq.:

Q. 1. State your name to the court and jury.

A. J. C. Turkenkoph.

Q. 2. Where do you reside?

A. Connersville.

Q. 3. What is your occupation?

A. Manufacturer of cigars.

Q. 4. For what length of time have you resided in the city of Connersville?

A. Thirty-three years.

Q. 5. Are you a property owner there?
A. Yes sir.
Q. 6. Are you acquainted with the values of real estate in the city of Connersville?
A. Yes sir.
Q. 7. State to the jury what, in your opinion, would be a fair cash price for sixty-six feet square in the city of Connersville, located at the intersection of Grand Avenue and the C. H. and D. Railroad track.
A. About one hundred and fifty dollars.
Q. 8. How much?
A. One hundred and fifty dollars.
Q. 9. Have you any property lying close to that opening?
A. No sir.

Cross-examination.

Questions by Judge M. E. FORKNER:

Q. 10. Were you one of the Commissioners that as-
131 sessed the value in this matter?
A. Yes sir.
Q. 11. Is the value of real estate in the city of Connersville uniform throughout the city, regardless of the uses for which it is used?
A. Of course there is a difference. On Central Avenue and prominent streets, the value would be more than this land Mr. McKee is speaking about.
Q. 12. Is there a difference there according to the uses it is put to?
A. No sir.
Q. 13. You take real estate where the McFarland House stands, what is that worth a front foot, with the building,—suppose you just take building and all, what is it worth a front foot?
A. I could not tell until I have figured it out.
Q. 14. It would be worth four or five hundred
Turkenkoph. dollars?
A. No, not that such.
Q. 15. Including the buildings.
A. It covers a good deal of ground.
Q. 16. How?
A. It covers nearly half a square.
Q. 17. Go down to the National Bank Building,—you know where that is, do you?
A. Yes sir.
Q. 18. Now, that has got a substantial three-story building on it, hasn't it?
A. Yes sir.
Q. 19. What is the ground worth a front foot, building and all?

To which question and the answer sought to be elicited
132 the plaintiff objected, upon the ground that the question calls for a different location, and property of an absolutely different character, and it could have no relation whatever to a simple pile of dirt.

The Court overruled such objection. To which ruling of the court the plaintiff excepted at the time.

A. Well, the value of the whole building would be about thirty thousand dollars.

Q. 20. How many front feet is there on Main Street there?

A. I could not just exactly say.

Q. 21. About how many?

A. I think it is eighty-two on Fifth Street and eighty-two and a half on Central Avenue. It is the most prominent corner in Connersville.

Q. 22. Now, the difference between the value of that and ordinary open lands arises out of the fact that there is a valuable building on it, and the uses it is put to?

Turkenkoph. A. The location, of course.

Q. 23. Now, in fixing this value of this land there, and in making your award here, did you consider the value of the embankment that is upon it?

A. How is that?

Q. 24. Did you consider the value of the embankment that is on it there, of the railroad company?

A. No, I don't think we did. We just valued it at what it would be worth.

Q. 25. The value that you put on it now, is simply the value of that piece of ground there if the railroad embankment and
133 everything was stripped off of it; that is the value you put on it, isn't it?

A. Of course it requires some expense to remove the dirt.

Q. 26. The one hundred and fifty dollars that you put on that piece of ground there is the value of the ground after the embankment is simply cut off and carried away, isn't it?

A. Well, we didn't consider that when we valued it.

Q. 27. You did not consider it?

A. No sir.

Q. 28. Are you in any — acquainted with the value of railroad property and railway construction?

A. No. I never bought any or knowed that they sold it at. I never knew a railroad to sell any land when they got it.

Q. 29. You would not know what that section of that railroad would be worth considered as a railroad structure and railroad property, would you?

A. I took the value of the land at what it was worth. I didn't take into consideration what its value to the railroad was.

Question by Mr. McKee:

Turkenkoph. Q. 30. Just took the bank as it was?

A. Yes sir.

Cross-examination continued.

Questions by Judge Forkner:

Q. 31. You didn't say that, did you?

A. If I didn't say that, I meant the value of, the bank and ground there.

Q. 32. You say now that you considered the value of the bank?
A. Well, it might be valuable to somebody if they wanted
134 to have the dirt they would be glad to get it.

And further this witness saith not.

Hansen—Direct.

CARL L. HANSEN, called as a witness on behalf of the plaintiff, and having been first duly sworn to testify to the truth, the whole truth and nothing but the truth relating to the above entitled cause, testified as follows:

Examination-in-Chief.

Questions by David W. McKEE, Esq.:

Q. 1. You may state your name to the court and jury.
A. Carl L. Hansen.
Q. 2. About what is your age?
A. Thirty-eight.
Q. 3. What is your occupation?
A. Civil Engineering.
Q. 4. How long have you been engaged in civil engineering?
A. Since 1888, about sixteen years.
Q. 5. What official position, if any, do you now hold?
A. Assistant Engineer of the Indianapolis and Cincinnati Traction Company.
Q. 6. And any civil or official position?
A. I am the division engineer, or the resident engineer of the Connersville end.
Q. 7. Of the Cincinnati and Indianapolis Traction Company?
A. Yes sir.
Q. 8. Do you hold any county office?
A. Yes sir; Surveyor of Fayette County.
Q. 9. State whether or not you were at any time civil engineer for the City of Connersville?
135 A. Yes sir, I was for seven years.
Q. 10. And what, if any, engineering work was carried on while you were engineer?
A. Well, we established the system of grade lines for the city, built about thirty-five miles of cement sidewalks and a sewer system, an eighty thousand dollar sewer system, and prepared plans for the curb and gutter work and brick street.
Q. 11. You spoke of this I. and C., what division, or what section of that work has been under your supervision?
A. The construction work from Glenwood to Connersville.
Q. 12. State whether or not that construction work covers the great arch and fill at Williams Creek.
A. It does, yes sir.
Q. 13. State to what extent, if any, there was cuts and excavations made under your supervision.

To which question and the answer sought to be elicited, the defendant objected, upon the ground that that question is not at all material to this cause.

Hansen Direct.

By Mr. McKee:

I am simply showing the experience he has and how close it is to Connersville.

The Court overruled such objection. To which ruling of the court the defendant excepted at the time.

A. Yes, we had quite a good many cuts and fills.

Q. 14. Just in rough figures, about how many cubic yards of fills were made?

To which question and the answer sought to be elicited
136 the defendant objected, upon the ground that the number of cubic yards of cuts and fills in the construction of this traction company is not a fact that is material to be considered in this cause.

By the Court:

That, of course, is true, but I assume that this is a preliminary question, as showing his general experience.

The Court overruled such objection. To which ruling of the court the defendant excepted at the time.

A. Oh, something between three hundred and fifty and four hundred thousand yards.

Q. 15. I did not catch the first.

A. Between three hundred and fifty and four hundred thousand yards.

Q. 16. How close to the city of Connersville did this work come?

To which question and the answer sought to be elicited the defendant objected, upon the ground that it is wholly immaterial to any of the issues of this cause.

Hansen Direct.

The court overruled such objection. To which ruling of the court the defendant excepted at the time.

A. It came within the city limits of Connersville, within the city limits.

Q. 17. Are you acquainted with the location of what is known as the old C. H. and D. Railroad or Railway in the City of Connersville?

A. Yes sir.

137 Q. 18. About what fraction or portion of the platted city lies north and what south of that railroad?

A. Well, from memory I should judge that the larger part of the city lies north of the line of the C. H. and D. railroad, cutting through the city.

Q. 19. About how much the larger?

A. Well it contains more than half, probably sixty per cent or sixty-five.

Question by Mr. CONNER:

Q. 20. You are speaking of the plats?
A. Of the platted ground.

Question by Mr. MCKEE, continuing examination-in-chief:

Q. 21. Have you any knowledge at all, or approximate knowledge as to the portion of the population that resides north of the railroad?
A. I have not any statistics on that, but I should judge almost half.
Q. 22. You are familiar, I suppose, with the location of the C. H. and D. station?
A. Yes sir.
Q. 23. What do you know, if anything, as to the switching on that railroad, as to whether they do or do not switch across Central Avenue, where the ur.lergrade crossing is?

Hansen Direct.

To which question and answer sought to be elicited, the defendant objected, upon the ground that it is entirely immaterial to any of the issues in this cause, and does not rebut any of the evidence introduced by the defendant in this cause.

The court sustained such objection. To which ruling of
138 the court the plaintiff excepted at the time.

Q. 24. About how far is the under-grade crossing at Central Avenue from where Grand Avenue crosses the railroad?
A. About four hundred and fifteen feet.
Q. 25. About how far, if you know, is it from the Grand Avenue crossing to the Milton Pike and Western Avenue crossing?
A. That must be six or seven hundred feet.
Q. 26. Are you familiar with the railroad embankment at the crossing on Grand Avenue?
A. Yes sir.
Q. 27. State whether or not you ever made any measurements to ascertain the height and width of the fill there.

Hansen. Direct.

A. I made some measurements several years ago, and then I refreshed myself this morning in regard to the matter. I took some measurements there this morning.

Q. 28. And if the embankment,—not counting the embankment, is the territory at that place level or rolling?
A. Moderately level.
Q. 29. Now, take it on the south, would the water naturally run south from the road?
A. Yes sir.
Q. 30. A little droop to the south?
A. Yes sir.
Q. 31. How far is it on the north?
A. It runs toward the west, slopes toward the canal, parallel with the line of railroad.
Q. 32. Mr. Hansen, did you measure the width of Grand Avenue?

A. Yes sir.

139 Q. 33. What is the width?

A. Sixth-six feet.

Q. 34. Did you measure the width of this fill or grade, if the earth should be brought down to about a level grade through there, what the width of the fill would be, bringing it down to grade?

A. Yes sir.

Q. 35. About what was that?

A. About sixty-five feet, sixth-five or sixty-six feet.

Q. 36. What is the height of that embankment?

A. Thirteen feet on the center line.

Q. 37. Now, what is the height of the rail from the grade below?

A. About fourteen and a half feet.

Q. 38. Now, what makes up the difference, then, between the height of the fill and the top of the rail?

A. That is the rail, which is about four inches high, four and three-fourths, and the tie and ballast, about eighteen inches of ballast, tie and rail.

Q. 39. Did you make a calculation of the number of cubic yards of earth that would necessarily be removed in order to open up that way, sixty-six feet wide?

A. Yes sir.

Hansen. Direct. To which question the defendant objected and moved the court to strike the answer of the witness from the record, upon the ground that it leaves the witness to determine what would be necessary to be removed.

The court overruled such objection. To which ruling of the court the defendant excepted at the time.

140 Q. 40. How much?

A. About thirteen hundred and fifty yards.

Q. 41. You are familiar, are you, with the price or cost of excavating and removing earth in that vicinity?

A. Yes sir.

Q. 42. Tell the jury what would be the fair cost of expense of removing that thirteen hundred and fifty yards of earth.

A. About four hundred dollars. About twenty-five cents a yard. A little less than four hundred dollars.

Q. 43. Are you in any way connected with the city government of Connersville?

A. No sir.

Cross-examination.

Questions by Judge M. E. FORKNER:

Q. 44. Now, in figuring the number of cubic yards to be removed here have you figured that up to the property line?

Hansen. A. Yes sir.

Q. 45. That is that property line, now, as it is shown upon the plats of the city?

A. Yes sir.

Q. 46. Isn't it a fact that that grade, in its years of improvement and settlement, has extended out over the property line considerably?

A. I do not know whether there is any property line along there.

Q. 47. I understand you to say that you did measure the width of the grade between the property lines, and if there were not any, how did you do that?

A. Of course there is property lines parallel with the
141 street of Grand Avenue.

Q. 48. Isn't there property lines parallel with the railroad?

A. They may have, but I don't know anything about them, nor nobody else. They figure by occupancy.

Q. 49. How?

A. They figure by the occupancy of the embankment.

Q. 50. You have figured by the occupancy of the embankment?

A. Yes sir.

Q. 51. You paid no attention to the property lines?

A. No sir.

Q. 52. You don't know where any property lines exist there?

A. Yes sir.

Q. 53. And yet you have made thirty-five miles of sidewalks right up to it?

Hansen. A. Yes sir.

Q. 54. You don't know where there is a single property line?

A. I told you to the foot of the embankment.

Q. 55. You say it would be worth so much a cubic yard to remove that embankment,—how would you go about removing it?

A. Well a great many ways.

Q. 56. Well, how?

A. You could plow some of it; dig it up with a shovel, put it in a wagon and haul it away; you could take some of it away in slip scoops.

Q. 57. Where would you put the dirt?

A. A good deal of it around in the neighborhood of this.
142 Q. 58. Pile it on lots?

A. A great many people there want their lots filled up.

Q. 59. How do you know that?

A. Because we have had inquiries for dirt since I have been with the traction company, in the last month or two.

Q. 60. Who, in that neighborhood, has wanted dirt filled?

A. The Trust Company. Not exactly the Trust Company, but Charlie Smith, the Recorder.

Q. 61. How far is his property from this place?

A. Five or six hundred feet.

Q. 62. How big is his lot?

A. Forty by one hundred and thirty-two.

Hansen. Q. 63. Forty by one hundred and fifty-two?

A. One hundred and thirty-two.

Q. 64. Generally level?

A. Moderately.

Q. 65. To put this embankment down on this lot he would have a pretty high lot?

A. Yes, all one lot.

Q. 66. You think you could plow some of it and you could scoop some of it,—what else could you do, how else could you do it?

A. Haul it away.

Q. 67. How are you going to get the—What are you going to do with the railroad?

A. Dig it up and haul it out.

Q. 68. What are you going to do with the railroad?

A. What are we going to do with it?

Q. 69. Yes sir.

143 A. Well, let the railroad company put in their structure first.

Q. 70. Well, suppose you had it to do, could you do that work without putting a structure in there?

A. That work is not generally done that way.

Q. 71. Could you cut that grade out there without putting a structure in there?

A. Not without some maintenance.

Q. 72. What kind of maintenance would be necessary?

A. Either a permanent or temporary structure.

Q. 73. It would be impossible to remove that embankment there without putting some kind of a temporary structure to maintain the tracks?

Hansen. A. Or a permanent structure.

Q. 74. You could not put a permanent structure unless you dig down in the embankment?

A. You would have to put the buttresses in first.

Q. 75. If you put in a permanent structure, to do this what would a permanent structure cost?

A. I have made no estimate of that.

Q. 76. If you put in a temporary structure there, what would it cost?

A. That would not be a profitable thing to do.

Q. 77. I am not asking you that. There are other gentlemen who have a right to determine things besides you. How much would it cost?

A. The thing to do is to start right and put in a permanent structure.

Q. 78. We think we know something about railroad building. I am putting a simple question. Suppose that you were to put in a temporary structure there to sustain that track while you are

144 cutting out that embankment; how much would that temporary structure cost?

To which question and the answer sought to be elicited the plaintiff objected, upon the ground that it was immaterial to any of the issues in this cause.

The court overruled such objection. To which ruling of the court the plaintiff excepted at the time.

Q. 79. You have not figured on that, have you?

A. I have some figures in my mind that I draw on in cases of that kind.

Q. 80. If you cannot give us accurately, why, give us an estimate?
A. About nine hundred dollars.

Hansen. Q. 81. Now then, you say that that is not the proper way to do. What would be the proper way to do? Let us get at it right now.

A. The proper way would be to drive some piling in there and get some support for your track, and then excavate out between them and put in your foundation on each end, and then temporarily hold your track in such a way that you could put your iron structure up.

Q. 82. Instead of driving piles down and removing the earth from the way, including the abutments, and then putting your abutments in, supporting your track in the meantime upon piling, you would drive your piling and put in your abutments first, would you?

A. Yes sir.

Q. 83. And then you would be building a permanent structure?

A. Yes sir.

145 Q. 84. You think that would be necessary and proper in order to remove this bank?

A. To get your track.

Q. 85. How much would it cost to drive piling and put in these abutments in order that you might move this?

To which question the plaintiff objected, and to the answer sought to be elicited, upon the ground that it was immaterial to any of the issues in this cause.

The court sustained such objection.

Thereupon the defendant withdrew said question.

Q. 86. Now, is a railroad embankment more or less valuable as it becomes settled by years of use as compared with a green *me*bankment?

A. Yes sir.

Q. 87. Take this embankment. Do you know how long it has been standing there?

A. Not exactly. Somewhere more than thirty years.

Hansen. Q. 88. What material is it built of?

A. Well, mostly clay.

Q. 89. Yellow clay, is it?

A. Yellow and white and blue clay.

Q. 90. Is it worth more to deliver a cubic yard of earth at a point in building a structure of that kind and then thoroughly tamp it until it is as solid as this embankment is than to simply haul a cubic yard of dirt and dump it on the wholesale?

A. Sure.

Q. 91. Worth a good deal more?

A. Yes sir.

And further this witness saith not.

146 R. J. GREENWOOD, called as a witness on behalf of the plaintiff, and being first duly sworn to testify to the truth, the whole truth, and nothing but the truth relating to the above entitled cause, testified as follows:

Greenwood—Direct.

Examination in chief.

Questions by DAVID W. MCKEE, Esq.:

Q. 1. What is your name?
A. R. J. Greenwood.
Q. 2. What is your age?
A. Thirty-two.
Q. 3. What is your occupation?
A. City Engineer of Connersville.
Q. 4. How long have you been engaged in civil engineering?
A. About eighteen months.
Q. 5. What course of stufy, if any, did you take on the subject?
A. I graduated from Purdue University in civil engineering.
Q. 6. Purdue University?
A. Yes sir.
Q. 7. Are you the City Engineer of Connersville?
A. Yes sir.
Q. 7. Are you acquainted with the location of the C. H. and D. Railroad track at the point that it crosses Grand Avenue in the City of Connersville?
A. Yes sir.
Q. 9. About how long have you known that location?
A. Eighteen months.
Q. 10. Did you ever make any measurements of the ground and fill?
147 A. Yes sir.
Q. 11. About when?
A. Well, within the last two weeks.
Q. 12. About what is the general lay of the land there, not considering the fill as to whether it is level or not, at that portion of the city?
A. It is level.
Q. 13. About what is the width of Grand Avenue?
A. Sixth-six feet.
Q. 14. Did you notice this embankment at its slope, as to whether it is or is not spread out into the street some?
A. Yes, it is spread out into the street some.
Q. 15. Taking the width of sixty-six feet through the railroad, if it was cut sixty-six feet wide both ways, sixty-six feet square, or as nearly square as it could be, would that or not reduce it to about the grade of the street?
A. I do not understand your question.

Greenwood Direct.

Q. 16. Taking the width of sixty-six feet through the railroad, if it was cut sixty-six feet wide both ways, sixty-six feet square, or as nearly square as it could be, would that or not reduce it to about the grade of the street?

The plaintiff then withdrew such question.

Q. 17. Whether, if there was sixty-six feet, the width of the street, cut through there, and cut so that it made a width of sixty-six feet at the bottom if cut through, would that reduce it to about the grade of the street, or not? If it was cut down to make the cut through the railroad sixty-six feet wide, would it make it about the grade of the street?

148 A. I think, if you take a width through there of sixty-six feet it would bring it about two or three feet above the grade.

Q. 18. You think it would be above the grade?

A. Yes sir.

Q. 19. Did you make any calculation of the number of cubic yards of earth that would be removed if it was cut practically to the grade of the street and sixty-six feet wide through that embankment?

A. No sir. I made the calculation if you would take all the dirt out of there it would be necessary to cut to the grade of the street, it would be between fourteen and fifteen hundred yards.

Q. 20. Cutting it clean to the grade of the street?

A. Yes sir. That is, counting the dirt that has come off the embankment and come down onto the street.

Q. 21. About how many feet below the place where wagons drive and where it is used does this extension of it, or spread of it extend?

A. I do not understand your question exactly.

Greenwood Direct.

Q. 22. Now, you say that the foot of it extends out a little?

A. Yes sir.

Q. 23. How many feet does it extend onto the place where wagons can be driven and turned?

A. I would say about eight or ten feet on the side.

Q. 24. Have you had any experience in the matter of excavations or removing dirt or making fills?

A. I have had some experience in removing dirt, hauling dirt.

Q. 25. What would be a fair price for removing the earth in cutting through a fill of that street?

149 A. I would estimate it about twenty-five cents a yard. I mean by that, just taking the dirt out of there, if there was nothing else in the road.

Q. 26. Well, if there should be some piling or trestle work, something of that kind encountered, what then?

A. I could not see that that would make any difference, unless we would have to put in a temporary structure to hold up the track.

Q. 27. You are not counting that. Just for the removal of the earth?

A. Just for the removal of the earth.

Q. 28. As a matter of fact, in removing earth there, what do you know as to whether it can usually be disposed of?

A. I have never had very much trouble in disposing of dirt so far. The people in that neighborhood all need dirt. We have a lot of dirt to dispose of in the south end of town, and there have been several, I don't remember their names, who have asked me to haul dirt to their lots.

Greenwood Direct.

Q. 29. There is then a demand, at about how much a load?

A. About ten or fifteen cents a load.

Q. 30. Now, estimating it at twenty-five cents, did you make any deduction on account of the price that you could sell the dirt for?

A. No sir.

Q. 31. What is the height of that embankment,—I believe I did not ask—bringing it down flush with the grade of the street?

A. Down to the grade of the street?

Q. 32. Yes sir.

150 A. It is a little more than fourteen feet to the top of the rail.

Q. 33. To the top of the rail?

A. Top of the rail, yes sir.

Q. 34. About what would it be to the top of the embankment?

A. About thirteen feet.

Q. 35. I will ask you,—you are familiar with the city and the plat of Connersville?

A. Yes sir.

Q. 36. Having been the engineer, you say, for some eighteen months?

A. Yes sir.

Greenwood Direct.

Q. 37. About what portion of the platted city is north and what south of the railroad?

A. I never made any exact measurements, but in my judgment about twice as much lies north of the railroad as south.

Q. 38. Have you any particular knowledge as to the population or not?

A. I have seen figures, voting figures.

Q. 39. To the best of your knowledge, about what part of the population resides north of the railroad?

A. I would say that Ninth Street is about the division line. Ninth Street is a square south of the C. H. and D. tracks.

Q. 40. One square south?

A. Yes sir.

Q. 41. About how far, either in city squares or rods, about how far does Grand Avenue run south from this railroad?

151 To which question and the answer sought to be elicited the defendant objects, upon the ground that it is immaterial to any of the issues in this case.

The court overruled such objection. To which ruling of the court the defendant excepted at the time.

A. About fourteen squares.
Q. 42. How far, how many squares, does it extend north?
A. It extends from Tenth to Twenty-Second Street.
Q. 43. From Tenth to Twenty-Second?
A. Yes sir, twelve squares.
Q. 44. Then the greater length lies north?
A. Yes sir, that is through the city limits.

Greenwood Direct.

Q. 45. You spoke about Twenty-Second, is or is not Twenty-Second Street the extreme north limit of the city?

A. Yes sir.

Q. 46. Now, is there on the south or not, taking Grand Avenue and the streets immediately connecting with it, an open highway extending to the south limit of the city?

A. Grand Avenue runs to Sixth Street and then there is a narrow alley from Sixth to Fifth, and then Grand Avenue extends clear to the south limit of the city.

Q. 47. So that there is a way from the extreme south end of the city, right up Grand Avenue, except this narrow square?
A. Just between Sixth and Fifth, that is the only place.
Q. 48. Between Sixth and Fifth?
A. That is along the site of the lumber yard.

Cross-examination.

152 Questions by Judge M. E. FORKNER:

Q. 49. In counting the platted territory north of the railroad do you count the cemetery?
A. Yes sir.
Q. 50. Now, are there any stores north of the railroad?
A. Yes sir.
Q. 51. How many?
A. There is six or eight.
Q. 52. And where are they situated, with reference to this Grand Avenue?
A. I believe there is one on Grand Avenue.
Q. 53. What kind of a store is it?
A. It is a restaurant. I think they sell groceries, too.
Q. 54. A little liquor with it?
A. No sir, I don't think so. I never bought any there.
Q. 55. No business is there.—There is not any what we call extensive or first class stores?

Greenwood.

A. No sir, the north part of the town is the residence district.

Q. 56. Any churches up there?
A. Yes, they have four, I believe.
Q. 57. A colored church?
A. Yes sir.
Q. 58. They are not all colored churches up there?
A. No sir, one colored church.
Q. 59. They have some schools up there?

A. The high school building is on Grand Avenue.

Q. 60. And north of the railroad?

A. Yes sir.

153 Q. 61. Now, isn't it true that the court house, the main church structures, the banks, and hotels and large stores are all in the south part of the town?

A. Yes sir.

Q. 62. That is what is known as the old part of Connersville?

A. Yes sir.

Q. 63. What distance is it from what you might term the business district of Connersville north to this railroad?

A. Well, the business district of Connersville comes to Seventh Street, and the railroad is about Tenth Street.

Q. 64. You have lived in Connersville a good many years, have you?

A. I have lived there eighteen months.

Q. 65. You have not lived there before you went there and took charge?

A. No sir.

Q. 66. You went there from Purdue University?

A. Yes sir.

Greenwood. Q. 67. You took a technical course there, I presume?

A. Yes sir.

Q. 68. Did you ever play on the foot ball team?

A. No sir.

Q. 69. Now, suppose that you were going to build this embankment there, and you would have to haul the dirt or convey it from two to three thousand feet, place it in place, and then tamp it and settle it until it was as solid as this embankment, how much do you think it would be worth a yard to do it, a cubic yard?

A. Only time could make it as solid as it is now.

Q. 70. How?

154 A. Only time could make it *is* as solid as it is now.

Q. 71. Only time?

A. Yes sir.

Q. 72. Then, is it true that that bank cannot be placed there in as substantial a condition as it is now except by time settling it. Is that a fact about it?

A. I am inclined to believe that it is.

Q. 73. How long would it take, how many years would it take a new embankment in there to solidify and be as good as this?

To which question and the answer sought to be elicited the plaintiff objects, upon the ground that there is no question in this case about a new embankment being put in there, and it is immaterial to any of the issues in this cause.

Greenwood. The court overruled such objection. To which ruling of the court the plaintiff excepted at the time.

A. I do not believe that I can answer your question exactly, I don't think. It would take from five to ten years.

Question by Mr. CONNER:

Q. 74. Did you say from five to ten?

A. I would judge so. I do not have any absolute knowledge on that question at all.

Question by Judge FORKNER, continuing examination:

Q. 75. Did you state that you thought it would be worth twenty-five cents per yard to remove this embankment?

A. Yes sir. Just to move that much dirt out of that embankment.

155 Q. 76. Now, in that you didn't consider anything that would be necessary to support the track or keep it in operation while that was being done?

A. No sir, that would be an expense I would have no way of calculating.

Q. 77. Have you included in that any expense of superintendence and supervision of the work by officials, looking to the *Greenwood.* safety of the track. Have you considered anything of that kind?

A. Looking to the safety of the track?

Q. 78. Yes sir.

A. I did not consider the track at all.

Q. 79. Your estimate is placed upon the basis that if that embankment was there and if there was no railroad there, nothing to interfere with it, just go and cut it down and haul it away you think would be worth twenty-five cents?

A. Yes sir.

Q. 80. I will ask you one question. Do you know how many cubic yards of ballast there is in that embankment?

A. Well, I would judge, about sixty-six feet long, sixty-six feet and a half, probably, on the angle, and about ten feet wide and a foot thick: about six hundred and sixty cubic feet. You can divide that by twenty-seven.

Greenwood—Redirect.

Redirect examination.

Question-d by DAVID W. MCKEE, Esq.:

Q. 81. About how many cubic feet?

A. Six hundred and sixty cubic feet.

Q. 82. My friend Forkner seems to be interested in the cemetery. Is that a large cemetery or not?

A. Well, it is about, between three and four squares.

156 Q. 83. Outside of the cemetery, the platted portion of the town, how does the portion south compare in size with the portion north? Throw the cemetery out.

A. I would not consider that the cemetery made any *Greenwood Redirect.* appreciable difference. In my answer I believe I said about sixty or seventy per cent north. I would say about sixty-four or sixty-five per cent north.

Q. 84. Sixty-four or sixty-five per cent north without counting the cemetery?

A. Without counting the cemetery, yes sir.

And further this witness saith not.

FREDERICK I. BARROWS, called as a witness on behalf of the plaintiff, and being first duly sworn to testify to the truth, the whole truth, and nothing but the truth relating to the above entitled cause, testified as follows:

Barrows—Direct.

Examination-in-chief.

Questions by Judge W. O. BARNARD:

Q. 1. What is your name?

A. Frederick I. Barrows.

Q. —. Where do you reside?

A. Connersville, Indiana.

Q. 3. What official position, if any, do you occupy, with reference to the City of Connersville?

A. I am the Mayor of the City of Connersville.

Q. 4. How long have you been Mayor?

A. Since the 31st of September of this present year.

Q. 5. How long have you lived in Connersville?

A. I have lived there ever since early in the year 1881.

157 Q. 6. Are you acquainted with the plat of the city of Connersville?

A. I am.

Q. 7. Are you acquainted with the railroad, known as the C., H. & D. Railroad that runs through the city east and west?

A. Yes sir.

Q. 8. Are you acquainted with the location of the road where it crosses the proposed highway or connection of the proposed highway, Grand Avenue?

A. Yes sir. I have known that place all the time I have lived in Connersville.

Q. 9. What portion of the platted territory of the town of Connersville is north of this point?

A. Without making any figures, I would judge that two thirds of the platted territory of the city of Connersville is north of the C., H. and D. Railway.

Q. 10. What proportion of the population, in your judgment is north?

A. Just about half of the population.

Barrows Direct. Q. 11. About what is the entire population of the city of Connersville?

A. I have no certain way of knowing, but judged by the population in 1900 and by the votes cast in the election one year ago, I would judge that the population inside the city limits is very near ten thousand people.

Q. 12. Where is the High School located in the city?

A. It is located on Grand Avenue, I believe, between Sixteenth and Seventeenth Streets.

Q. 13. That places it on which side of this railroad?

A. It places it north of the railroad.

158 Q. 14. And how long has it been located there?

A. It has been there, I think, two or three years, I am not positive.

Q. 15. A new building?

A. It is a new building.

Q. 16. Do you know anything about the cost of the building?

To which question and the answer sough- to be elicited the defendant objects, upon the ground that it is immaterial to any of the issues in this cause.

The court sustained such objection.

Thereupon the plaintiff withdrew the question.

Q. 17. Are there any church buildings on Grand Avenue north of this railroad?

A. Yes sir.

Q. 18. How many?

Barrows Direct.

A. On Grand Avenue, let us see—I am wrong. Two churches on Grand Avenue.

Q. 19. What other churches are there north of this railroad on other streets?

A. One on Indiana Avenue, the next street to the east, and one on Thirteenth Street, about a half square or a square off of Grand Avenue. I recall only four churches out of the ten or eleven, north of this road.

Q. 20. Where is the Baptist Church located?

A. The Baptist Church is located at the corner of Twelfth Street and Grand Avenue.

Q. 21. Is that north of the railroad?

A. Yes sir.

159 Q. 22. How close is it to the railroad?

A. About two blocks from the railroad.

Q. 23. How many business houses are there, about, north of the railroad?

A. Well, I could not say without counting them. There must be eight or ten.

Q. 24. The old city of Connersville is south of this railroad?

A. Yes sir.

Q. 25. The business portion and the old portion of the city or town?

A. You mean the mercantile portion or the manufacturing portion?

Q. 26. The mercantile portion?

A. The mercantile portion, the large part of the mercantile portion of the town is south of the railroad.

Q. 27. What factories, if any, are north of this railroad?

A. What is known as the north factory district. The principal manufacturing district of the town is north of the railroad.

Q. 28. What factories does that manufacturing district complete?

Barrows direct.

A. It comprises the Connersville Furniture Company, The Rex Buggy Company, The McFarland Carriage Company, The Connersville Belting Company, The Angstad Spring and Axle Company, with two factories, a spring factory and an axle factory, The George W. Carter Company, leather manufacturers, Connersville Wheel Company, The Rex Shield and Manufacturing Company, Triumph Safe and Lock Company. I guess that is about all.

160 Q. 29. These that you mention are all north of this C., H. and D. Railroad?

A. Yes sir.

Q. 30. Do you know how many men are employed in these factories?

Barrows direct.

To which question and the answer sought to be elicited the defendant objected, upon the ground that it was immaterial to any of the issues in this cause.

The court sustained such objection. To which ruling of the court the plaintiff excepted at the time.

Cross-examination.

Questions by REUBEN CONNER, Esq.:

Q. 31. Mr. Barrows, that portion of the town lying north of the railroad is the new portion of Connersville?

A. Yes, newer portion.

Q. 32. The lots that have been platted south of the railroad have been occupied by houses or buildings for many years, have they not, or about all of them?

A. Please repeat your question.

Q. 33. The lots that have been platted south of the railroad have been occupied by houses or buildings for many years, have they not, or about all of them?

Barrows.

A. The majority of the lots south of the railroad have.

Q. 34. There are many lots and the plats north of the railroad that are not occupied by any buildings?

A. Yes, there are a good many lots that are not occupied?

Q. 35. You will see a large scope of country that is platted,

161 that used to be the old fair grounds at the northeast part of the city, there is more than three-fourths of those lots that are vacant?

A. I would judge not.

Q. 36. What proportion, would you say, of those lots that are vacant?

A. I do not know just how far that plat goes. If it goes down in the bottoms there, then you are right, but up on the level, I would think that at least a third have houses on them.

Q. 37. You also include the plat of Edgewood?
A. I do not understand you.
Q. 38. I say, in your estimate you include the Edgewood plat?
A. Yes.
Q. 39. What proportion of the lots up there are occupied, simply from your own knowledge?
A. About ten per cent.
Q. 40. There is a great deal of unoccupied space about the factory district there?
A. Yes sir.

Barrows.

Q. 41. Do you include the Trust Company Addition, Maplewood, which used to be the Ball property?
A. That is the property lying between Twenty-second and Twentieth Streets, is it?
Q. 42. I could not tell you as to the number of the streets, but it is known as the Claypool property.
A. It would include all the property south of Twenty-Second Street, yes sir.
Q. 43. These factories that you speak of, they are west of the canal or hydraulic?
A. Yes sir.

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Q. 44. West of what is now the Big Four Railway?
A. I answered that too quickly. Part of them are west of the canal and part of them are east.
Q. 45. What is there east now, more than the Rex Buggy Company?
A. That is all besides the Heineman Sign Factory, or what is the name?

Question by Mr. McKee:

Q. 46. The Heineman Glass Sign establishment?
A. Yes sir.

Question by Mr. Conner, continuing examination:

Q. 47. They are not doing business there?
A. I do not know.
Q. 48. Those factories are also west of the Milton Pike?
A. All except the Rex Buggy Company.
Q. 49. And in going down to the main part of town, or the south part of town, or south of the railroad, there is a street on the west side of the canal, is there not?

Barrows.

A. Yes sir.
Q. 50. Leading from those factories?
A. Yes sir.
Q. 51. Is that not the street that is almost wholly used by the men who work in the factories who live south of the railroad?
A. Yes sir.
Q. 52. And there is a street just east of that, is there not, the Milton Pike?
A. Well, there is two roadways opening under the bridge there at the canal.

Q. 53. One on the west side and one on the east side of the
163 canal?

A. Yes sir, each of them about eighteen feet wide, I think.

Q. 54. And the factory hands pass from the shops to the south part of town almost universally using one of those roads, do they not?

A. All that don't go over the embankment.

Q. 55. Some of them go over the embankment on the west, do they not?

A. I did not understand?

Q. 56. Some of them go over the embankment on the west, do they not?

A. Yes sir.

Q. 57. They do that because it is nearer?

A. Yes sir.

Q. 58. Do you think Connersville has a population of ten thousand people?

A. Well, I have stated that I had no very definite data about the population, other than almost two thousand votes were cast one year ago inside the corporation line.

Q. 59. What ratio do you count?

Barrows. A. I think it is generally estimated that about four or five to the vote.

Q. 60. Don't you know, Mr. Barrows, that owing to the great number of young men and single men that are working in our factories there, that that ratio is not correct, or any ways nearly correct?

A. I do not know. I am not sure as to that.

Q. 61. Don't you know that there has been a census taken of our town in the last eight months by competent parties, and that we ran les- than eight thousand people?

164 A. I am sure that that census did not include all the corporate limits of Connersville.

Q. 62. How do you know?

A. I was told that it did not go farther than a certain street.

Q. 63. How do you know?

Barrows. A. I do not know that there was any census, as far as that is concerned, except of my information. I did not hear the result.

Q. 64. Didn't you hear that it was less than eight thousand people?

A. No sir, I did not hear the result.

Redirect examination.

Questions by DAVID W. MCKEE, Esq.:

Q. 65. Is it, or is it not a fact, that at the Grand Avenue crossing that there is a path worn there by men going up and down going over the railroad?

A. It is a fact.

Q. 66. Isn't it a fact that that pathway has been there for years?

A. Yes sir.

The defendant thereupon objected to the question and moved the

court to strike from the record the answer of the witness, upon the ground that it is wholly immaterial to any of the issues in this cause.

Barrows, Redirect.

The court sustained such objections and motion. To which ruling of the court the plaintiff excpeted at the time.

And further this witness saith not.

All Evidence.

And this was all the evidence given in said cause.

165 STATE OF INDIANA,
County of Henry:

CITY OF CONNERSVILLE
vs.
CINCINNATI, INDIANAPOLIS AND WESTERN RAILROAD COMPANY.

Stenographer's Certificate.

I, Fay Holliday, shorthand reporter, appointed by the Henry Circuit Court, of the County of Henry and State of Indiana, in the cause above entitled, and being duly sworn to report and take down in shorthand the oral evidence offered in said cause, hereby certify and state that as such shorthand reporter I took down in shorthand, in the above entitled cause, a full, true and complete verbatim report of all the oral evidence given in said cause, including both questions and answers, and noted all objections, offers to prove, rulings of the judge in respect to the admission and rejection of evidence, and objections and exceptions thereto. I further certify that I have made full, and complete copies in said transcript of the evidence, and all documentary evidence given to the jury, at the points and places in said transcript where the same were introduced in evidence on the trial of said cause. I further certify that thereafter at the request of the defendant, I copied into longhand the complete report of the evidence, rulings of the court, objections and exceptions, and I further certify that the above and foregoing typewritten transcript is a full, true and complete copy in longhand as made by me, of
166 the shorthand report of the evidence, objections thereto, rulings of the court thereon, and of the exceptions taken and *reversed* thereto, and of all documentary evidence given in said cause, and that the said above typewritten transcript of said shorthand report of the evidence in said cause contains all of the evidence given in said cause.

In witness whereof I have hereunto set my hand this, the Third day of December, A. D. 1906.

FAY HOLADAY,
Official Shorthand Reporter of the Henry Circuit Court.

And be it further remembered that the foregoing evidence was given in said cause and the same was all the evidence given in the cause.

Conclusion of Bill of Ex. No. 2.

And be it further remembered that evidence was offered, admitted and excluded and exceptions taken and reserved in respect thereto as stated in the foregoing.

And afterwards on the 24th day of November 1906, the same being the 48th Judicial day of the October Term 1906, of said court the court overruled the motion for a new trial of said cause and gave the defendant 90 days in which to prepare and file this its bill of exceptions and now to wit on the 6th day of December 1906, and within the time allowed by the court the defendant prepares and
167 presents to the Court this its bill of exceptions and prays that the same be signed, sealed and made a part of the record in said cause which is done accordingly in open court this 6th day of December 1906.

JOHN M. MORRIS,
Judge Henry Circuit Court.

168 And afterwards, to-wit: on the 25th day of January, 1907, the same being the 47th Judicial Day of the December Term, 1906, of the Henry Circuit Court, the following further proceedings were had in the above entitled cause, in said Court, to-wit:

No. 1342.

CITY OF CONNERSVILLE
vs.
CINCINNATI, INDIANAPOLIS & WESTERN RAILROAD COMPANY.

Appeal.

Præcipe Filed.

Comes now the defendant in the above entitled cause by counsel and files its precipe for a record in said cause herein in these words, to-wit:

169 STATE OF INDIANA,
Henry County, ss:

Henry Circuit Court, October Term, 1906.

No. —.

THE CITY OF CONNERSVILLE
vs.
THE CINCINNATI, INDIANAPOLIS & WESTERN RAILROAD COMPANY.

Præcipe for Transcript.

The clerk will please make a full, true and complete transcript of the judgment, record, proceedings and all papers in the above entitled

cause for appeal to the Supreme Court certifying the original bill of exceptions containing the evidence in lieu of a copy thereof.

REUBEN CONNER,
JOHN B. ELAM,
FORKNER & FORKNER,
Att'ys for the Defendant.

170 *Clerk's Certificate.*

STATE OF INDIANA,
Henry County, ss:

I, John K. Burgess, Clerk of the Henry Circuit Court of said County and State aforesaid, do hereby certify that the above and foregoing transcripts contains full, true, correct and complete copies of all papers and entries in said cause.

I also certify that on the 6th day of December, 1906, the official reporter who took down the evidence in said cause filed in my office his long-hand manuscript thereon, which is the same manuscript of the evidence incorporated in the bill of exceptions, made a part of the foregoing transcript.

And I further certify that the bill of exceptions containing the evidence hereinbefore inserted is the same identical and original bill of exceptions duly filed by the defendant in my office as Clerk on the 6th day of December, 1906.

In witness *hw*ereof, I have hereunto set my hand and affixed the seal of said Court at the Town of New Castle, this 6th day of March, 1907.

JOHN K. BURGESS,
[SEAL.] *Clerk Henry Circuit Court.*

Clerk's fees	$23.60
Binding Record	1.00
	$24.60

171 In the Supreme Court of Indiana.

No. —.

CINCINNATI, INDIANAPOLIS AND WESTERN RAILWAY COMPANY, Appellant,
vs.
CITY OF CONNERSVILLE, Appellee.

Filed April 5th, 1907. Edward V. Fitzpatrick, Clerk.

Appellant's Assignment of Errors.

Assignment of Errors.

The Cincinnati, Indianapolis & Western Railway Company the appellant in the above entitled cause for its assignment of errors in

said cause says, that there is manifest error in the proceedings of the Henry Circuit Court in said cause, as more fully appears from the record of said proceedings, filed herein in each of the following particulars, that is to say;

First. Said Henry Circuit Court erred in sustaining the plaintiff's demurrer to the defendant's fourth exception to the condemnation proceedings and the report of the City Commissioners of Appellee and to the action of the Common Council of said Appellee in adopting said report, to which ruling of said Court this defendant duly excepted at the time.

Second. Said Henry Circuit Court erred in overruling this Appellant's motion for a new trial to which ruling of said Circuit Court this Appellant duly excepted at the time.

Third. Said Henry Circuit Court erred in rendering judgment upon the verdict of the jury to which re-dition of said judgment this Appellant duly objected and excepted at the time.

172 Wherefore, said Appellant prays that for each of said errors of said Circuit Court, the judgment of said Circuit Court rendered herein be in all things reversed.

ELAM & FESLER,
FORKNER & FORKNER AND
REUBEN CONNOR,
Att'ys for Appellant.

Filed April 5th, 1907.

EDWARD V. FITZPATRICK, *Clerk.*

173 And that afterwards, to-wit: On the 9th day of April, 1907, the same being the 116th Judicial Day of the November Term, 1906, of said Supreme Court, the Sheriff of Fayette County, Indiana, Ex-officio Deputy Sheriff of the Supreme Court of Indiana, filed in the office of the Clerk of said Supreme Court the notice of said Appellee, The City of Connersville, together with his return duly endorsed thereon, which said notice and return are in the words and figures following, to-wit:

The State of Indiana to the Sheriff of the Supreme Court, Greeting:

You are hereby commanded to notify City of Connersville that on the 5th day of April, 1907, Cincinnati, Indianapolis & Western Railway Company filed in the Clerk's office of the Supreme Court of Indiana a transcript of the record and proceedings in a certain suit appealed from the Henry Circuit Court in which The City of Connersville was plaintiff and Cincinnati, Indianapolis & Western Ry. Co. was defendant, and notify said Appellee that at the expiration of thirty days from the date of service of this writ, said appeal will be submitted to said Supreme Court; and unless it appear at the Supreme Court room in Indianapolis, before said Supreme Court, and defend said appeal, the same will be proceeded upon in its absence. You are further commanded to make due return of this writ within ten days from date thereof.

Witness, Ed. V. Fitzpatrick, Clerk of said Supreme Court and the seal thereof, at Indianapolis this 5th day of April, A. D. 1907.

[SEAL.] EDWARD V. FITZPATRICK, *C. S. C.*

174 Came to hand April 6th, 1907.

Served on the within City of Connersville, by Reading to and in the hearing of Frederick I. Barrows, Mayor of the City of Connersville, *by reading to and within the hearing,* this 6th day of April, 1907.

CYRUS JEFFREY, *Sheriff.*

175 And that afterwards, to-wit: On the 6th day of May, 1907, the same being the 139th Judicial Day of the November Term, 1906, of said Court, the following further proceedings were had in said cause to-wit:

Comes now the Appellant, by its said attorneys, and this cause is submitted to the Court for judgment and decree as provided by Act of the General Assembly of the State of Indiana, Approved April 13, 1885, and the rules of said Court in relation thereto:

And that afterwards, to-wit: On the 1st day of July, 1907, the same being the 32nd Judicial Day of the May Term, 1907, of said Court, the further following proceedings were had in said cause, to-wit:

Comes now the Appellant by its said attorneys, and files its brief herein, which said brief is in words and figures following, to-wit:

(Here insert.)

176 And that afterwards, to-wit: On the 29th day of July, 1907, the same being the 55th Judicial day of the May Term, 1907, of said Court, the further following proceedings were had in said cause, to-wit:

Comes now the Appellant by its said attorneys, and comes also the Appellee, City of Connersville, by its attorneys, R. N. Elliott, and D. W. McKee, and said appellee now files its brief herein, which said brief is in the words and figures following, to-wit:

(Here insert.)

And that afterwards, to-wit: On the 10th day of August, 1907, the same being the 65th Judicial Day of the May Term, 1907, of said Court, the further following proceedings were had in said cause, to-wit:

Come the parties by their attorneys and the Appellant herein files its reply brief, which said reply brief is in the words and figures following, to-wit:

(Here insert.)

177 And that afterwards, to-wit: On the 16th day of November, 1907, the same being the 150th Judicial Day of the May Term, 1907, of said Court, the further following proceedings were had in said cause, to-wit:

Come the parties by counsel and the Appellee files its petition to advance this cause, together with proof of service of said petition, which said petition and proof of service is in the words and figures following, to-wit:

(Here insert.)

178 And that afterwards, to-wit: On the 26th day of November, 1907, the same being the 2nd Judicial Day of the November Term, 1907, of said Court, the further following proceedings were had in said cause, to-wit:

Come the parties by counsel and the petition heretofore filed by Appellee to advance said cause is granted by the Court, and said cause is advanced.

And that afterwards, to-wit: On the 28th day of January, 1908, the same being the 56th Judicial Day of the November Term, 1907, of said Court, the further following proceedings were had in said cause, to-wit:

Come the parties by their attorneys and the Court being advised in the premises, affirms the judgment of the Court below with the following opinion pronounced by Hadley, J.

179 THE STATE OF INDIANA:

In the Supreme Court, November Term, 1907.

On the 28th Day of January, 1908, being the 56th Judicial Day of said November Term, 1907.

Hon. Leander J. Monks, Chief Justice; Hon. John H. Gillett, Hon. James H. Jordan, Hon. Oscar H. Montgomery, Hon. John V. Hadley, Justices.

No. 21,012.

In the Case of

CINCINNATI, INDIANAPOLIS AND WESTERN RAILWAY COMPANY
vs.
CITY OF CONNERSVILLE.

Appealed from the Henry Circuit Court.

Come the parties by their Attorneys, and the Court being sufficiently advised in the premises gives its opinion and judgment as follows, pronounced by Hadley, J.

180 In 1869 appellant's grantor constructed a railroad from the City of Indianapolis to Cincinnati by way of the city of Connersville. In passing the city for some distance the railroad track was on a grade fifteen feet high and which is now sixty-six feet wide at the bottom and sixteen feet at the top. When built this part of the road was outside of the city limits and all the population resided

south of the railroad. Now the territory crossed by the embankment is within the city limits and about one-half of the city's population reside north, and the other half south of the railroad. The railroad runs east and west by the city. Running north and south entirely across the city is the street Grand Avenue, both ends of which are opened and used, to the railroad embankment. Four hundred and fifty feet east of Grand Avenue is an undergrade crossing, and six hundred feet west of Grand Avenue is another crossing. A traveler on Grand Avenue had no other more convenient way of crossing the railroad than by one or the other of these crossings.

This is a condemnation proceeding by appellee city to extend Grand Avenue across the right of way of appellant and the only question raised in this court relates to appellant's damages.

Grand Avenue is sixty feet wide and its extension through the railroad right of way requires the appropriation of a strip of ground sixty-six feet long, (the bottom width of the railroad), and sixty feet wide. Appellant has only an easement in the land.

From the evidence allowed and rejected and the instructions given and refused the jury, it is manifest that the question was submitted to the jury on the theory that appellant was only entitled to damages for, first, the value of any land actually taken from it; second, the value of the embankment necessarily taken; and, third, the cost of removing such embankment. "The sum of these items," the Court instructed the jury, "will constitute the full measure of the defendant's damages."

The Court refused to submit the question upon appellant's theory viz: that in addition to the elements of damage enumerated by the court in its charge to the jury, there should also have been stated that appellant was entitled to recover for any special or peculiar damage it would suffer by reason of the taking of the embankment which had been specially prepared for, and was being used as a part of its railroad, as well as the full cost of the structural change, or for the putting in of the necessary bridge over the highway.

181 Were the rulings of the Court erroneous?

The adjudications cited and relied upon by counsel for appellant cannot be accepted as supporting their view of the law. So far as we have observed in every state referred to except New Jersey, where there appears to be no legislation on this subject, the cases cited rest upon local statutes which in requiring railroad companies to construct and restore highway crossings have been construed to expressly or impliedly refer to such highways as were constructed before the crossing railroad.

In this state the law is ruled by section 5153 Burns 1901 which provides that all railroad "corporations shall possess the general powers and be subject to the liabilities and restrictions expressed in the special powers following." Fifth. To construct its road across any highway so as not to interfere with the free use of the same, in such manner as to afford security for life and property; but the railroad company shall restore the highway thus intersected, to its former state, or in a sufficient manner not to unnecessarily impair its usefulness.

This statute has been in force since May, 1853. In the case of Louisville etc. Company v. Smith, 91 Indiana, 119, 121; it was said in construing this statute, "Whether the highway is laid out and opened before or after the construction of the railroad, the legislative intent in the clause quoted is clear, we think, that the railroad company shall construct its road, at its intersection with such highway in such manner as to afford security for life and property." This interpretation of the statute has since been many times re-affirmed by this Court, the last expression being in Lake Erie etc. Company v. Shelley, (1904) 163 Ind. 36, 41 as follows: "Under the statutes of this state it is the duty of all railroad companies to construct and keep in safe and good condition, all highway crossings, and this duty is the same whether the highway was established before or after the railroad was built." Citing divers cases.

This statute was in full force and effect when appellant accepted its franchise, and the acceptance carried with it an assumption of all the duties and obligations imposed by the statute. It was bound to take notice that the right of the people to establish and maintain public highways over the territory remained unimpaired; and whether laid out before or after the railroad it should be the duty of the company to construct and maintain the crossing in such condition as will render it suitable and reasonably safe, as a
182 railroad crossing, for the passage of trains, and travelers on the highway.

There is no cross-assignment of error, and we are, therefore, not called upon to decide whether the instructions given by the Court contained a correct expression of the law relating to such subject, for under the view we have taken of the case, it is clear that the instructions given did not tend in any way to injure appellant.

As laid down in Railroad Company v. Shelley, 163 Ind. 36, 41, the statute of this state requires all railroad companies to construct and keep in reasonably safe and good condition, all highway crossings without reference to whether the highway was laid out and opened before or after the railroad. The duty to construct and keep in repair implies the obligation to defray the expenses and costs of such construction and repairs. Railway Company v. McCarrell, 163 Ind. 469.

It is, however, argued by appellant's counsel that this being a condemnation proceeding under the right of eminent domain, appellant is entitled to full compensatory damages, which includes, not only the value of the property taken, but, also, all consequential injury to the remaining property, which, in this case, embraces, in addition to the elements of damage enumerated by the Court, the cost of putting in the bridge over the street, and that a denial of damage for the cost of the bridge made necessary by the street crossing, is a taking of private property for public use without just compensation, in violation of both the federal and state constitution.

Appellant's counsel overlook the fact that there are two distinct principles of law that operate upon the question we have under consideration, namely, "eminent domain," which implies a taking by the sovereign for some public benefit, and the "police power" which

implies a regulation by the sovereign, of private property for the preservation of the public safety, health and general welfare. "Eminent domain" is a reserved right, or an unextinguishable attribute of sovereignty that may be exercised by the state, or its authorized agent, to effect a public good whenever public necessity requires it. Resting upon a public benefit it cannot, under the Constitution, be enjoyed by the public except upon condition that full compensation for all damage to private property for that taken or injured, shall be first paid or tendered.

The "police power" arises from a very different source. It
183 springs from the fundamental principle that every property owner must so use his own as not to endanger the safety, health and general welfare of the community in which he lives. Lewis' Eminent Domain, section 6, and authorities collated. It operates upon an existing evil that injuriously affects the health, morals, safety, or general welfare of the community, and is a power to which every person and corporation must yield obedience and from which the state itself cannot grant exception. Stone v. Mississippi, 101 U. S. 814; Butcher's Union Co. v. Crescent City Company, 111 U. S. 746.

"It extends to the protection of the lives, health, and property of the citizens, and the preservation of good order and public morals." Beer Company Case, 97 U. S. 33. Under its wide application, unwholesome and adulterated foods may be destroyed; the sale of intoxicating liquors restricted; easy exits from theatres and other public halls required, sometimes at heavy expense; also fire escapes from hotels and schoolhouses. This power may also compel builders to plank lofty floors, manufacturers to guard dangerous machinery, miners to maintain props. In an emergency from fire it may tear down private buildings and otherwise destroy private property without rendering compensation. 2 Kent Com. 339 Notes. It may also eject from populous communities, or confiscate the business, of all forms of public nuisance, thus rendering valuable structrures worthless, or of greatly reduced value, without any right to indemnity accruing to the sufferer.

Railroads are by no means exempt from this power. They enjoy, as grants from the people, superior rights to go where they please, and as fast as they please, subject to the duties that are constantly being imposed upon them having reference to the safety of persons and property. The use of improved breaks, switches, signals, couplers, and a multitude of other safety devices is often commanded, though previously used devices are thereby rendered worthless.

The same principle applies with equal vigor to highway crossings. There is probably more human life and property destroyed from collision with trains at railroad crossings than from all other railroad accidents combined.

It is evident that a high degree of care to avoid accidents at cross-
ings is of first importance. And there are reasons why rail-
184 road companies should be charged with the duty of constructing and maintaining all such crossings in a suitable and safe condition. In the first place their right to traverse the country on

private property is subject to the right of the people to construct highways for their own convenience across the same country, and the railroad, whenever it becomes necessary. Railway Company v. Railway Company, 30 Ohio St. 604; Railway Company v. Chicago, 140 Ill. 309, 317.

In the *second* place the peculiar danger at the crossings is all created by the railroads. In the *third* place the companies know best the character and requirements of their trains, and the means best calculated to minimize the dangers. In the *fourth* place a divided responsibility would likely prove impracticable, impolitic, and inefficient, and in view of the burdensome liability of railroad companies to their passengers it is clear that the companies should have the entire control of all things necessary to be done within its right of way, for any purpose, whether for the benefit of the Company or the public.

Anyhow, the Legislature deemed it expedient to enact section 5153, *supra*, which, under the interpretation given it by this court, requires a railroad company, at its own expense, to do whatever the conditions present at each particular place, require to be done, to render the crossing suitable and reasonably safe, "or in a sufficient manner not to unnecessarily impair the usefulness" of the highway, "or interfere with the free use of the same," and, "in such manner as to afford security for life and property." And when necessary to accomplish these ends the Company will be required to carry its railroad over, or under, the railroad, as the case may be. Elliott on Railroads, section 1107; Elliott's Roads and Streets, section 778, Chicago etc. Co. v. State, 158 Ind. 189, 193, and cases cited; Railway Company v. State, 159 Ind. 237; Baltimore etc. Co. v. State, 159 Ind. 510, 520; Vandalia R. Co. v. State, 166 Ind. 219.

Applying these principles to the question before us the appeal must fail.

Whatever was necessarily taken from the railroad company by the city in the extension of its street over the Company's right of way, may be said to have been taken in the exercise of eminent domain, and, therefore, subject to full compensation.

But the street being once across the right of way, whatever is, then, necessary, under the statute, for the Company to do to construct and maintain the crossing, in such manner as will render it suitable and safe, as a railroad crossing, for the passage of trains and travelers on the highway, is a regulation emi-
185 nating from the police power, and must be complied with without compensation. Lewis Eminent Domain, sections 6, 156; Chicago etc. Co. v. Zimmerman, 158 Ind. 189, and cases cited; Elliott on Railroads, section 1107.

The rule is well settled that neither a natural person or corporation can claim damages on account of being compelled to comply with a police regulation, designed to secure the public health, safety or welfare. Lewis Eminent Domain, section 6; Railroad Company v. Shelley, 163 Ind. 36; Elliott on Railroads, section 1103; Railway Company v. Chicago, 140 Ill. 309. It is equally well settled that an uncompensated obedience to a regulation ordained to secure the public health and safety is not a taking of private property, within

the inhibitions of the state or federal constitution. Lewis Eminent Domain, section 6; Mugler v. Kansas, 123 U. S. 623, 668; Railway Company v. Shelley, 163 Ind. 36, 46, and cases cited.

In the case at bar the jury was directed to allow appellant for the value of the land actually taken by the city in extending its street across the right of way, being a strip sixty-six feet long, (the bottom width of the railroad) and sixty feet wide, (the width of the street). Appellant had no interest in the land, as land, except an easement, that is, a right to lay its track and operate its cars and trains over the same, and when the Company had constructed the crossing as required by the law, and could run its cars and trains on the bridge over and across the street on the same old line and grade, it was still in the full enjoyment of its easement and there was no taking of its land beyond a temporary inconvenience. The Court also instructed the jury to further allow appellant the value of the section of the embankment that must be removed and also the cost of removing the same. The award under these instructions was $800.00 and it is clear that the instructions were as favorable to appellant as under the laws of this state it has the right to ask. See C. B. & Q. v. Chicago, 166 U. S. 226.

Judgment affirmed.

186 It is therefore considered by the Court that the judgment of the Court below in the above entitled cause be in — things affirmed at the cost of the Appellant.

And it is further considered and adjudged by the Court that the Appellee recover of the Appellant the sum of $— for its costs and charges in this behalf expended.

And that afterwards, to-wit:—On the 26th day of March 1908, the same being the 106th Judicial Day of the November Term, 1907, of said Court, the further following proceedings were had in said cause, to-wit:—

Come the parties by counsel and the Appellant herein files a petition for rehearing in said cause, which said petition for a rehearing is in the words and figures following, to-wit:—

In the Supreme Court of Indiana.

No. 21012.

CINCINNATI, INDIANAPOLIS AND WESTERN RAILWAY COMPANY, Appellant,
vs.
CITY OF CONNERSVILLE, Appellee.

Appellant's Petition for Re-hearing.

The Cincinnati, Indianapolis & Western Railway Company the appellant in the above entitled cause petitions the court to grant it a rehearing in said cause and respectfully represents that the court in

its opinion and decision announced and rendered in said cause erred upon each of the following particulars that is to say:—

1. In holding and adjudging that the appellant's measure of damages was limited to the value of any land actually taken
186½ plus the value of the embankment necessarily taken and the cost of removing such embankment and that it was entitled to recover no damages on account of the special value of the embankment to appellant by reason of its being used as a part of its railroad track and by reason of the use to which it was especially adapted and devoted.

2. Said court erred in deciding and adjudging that Section 5153 of Burns' annotated Statutes of 1901 requiring a railroad company to restore a highway intersected by its railroad track to its former state or in a sufficient manner to not unnecessarily impair its usefulness was applicable to the case before the court and controlled its decision.

3. The court erred in deciding and adjudging that the rules of law, applicable to a highway crossing and its construction and protection apply to and govern the case here presented by this appellant wherein a structure erected to carry its track is destroyed in the opening of a proposed highway.

4. The court erred in holding and adjudging that the police power authorizes the taking or destruction of property without compensation for the mere purpose of providing a more convenient highway or opening an additional street in a city where there are already other streets nearby crossing the right of way of the Railroad Company the property of which is so taken.

5. The court erred in holding and adjudging that the protection of highway crossings, where they cross Railroads for the purpose of preventing collisions and like accidents incident to such crossings has any application to the taking and destruction of an embankment
where no highway exists and solely for the purpose of open-
187 ing a new one, there being at the time proceedings for that purpose are begun no highway crossing at the point in question and no occasion to protect anybody from accident there, and that this consideration should in any way effect the measure of damages in this proceeding.

6. The court erred in holding and adjudging that when the street in question was once extended over Appellant's right of way then whatever was necessary under Section 5153 Burns' Annotated Statutes, 1901, to construct and maintain the crossing must be done and that what was so necessary could not be considered in determining the measure of damages for the taking and destruction of the embankment to be taken and destroyed by the extension of the street and that the appellee could first extend the street of its own motion and then insist that a condition had been so created that it was excused from paying the Appellant the value of its property taken for the use to which it was devoted and for which it was adapted.

Respectfully submitted.

JOHN B. ELAM,
JAMES W. FESLER, AND
HARVEY J. ELAM,
Att'ys for Appellant.

188 And said Appellant al o files its brief on said petition for a rehearing which said brief is in the words and figures following, to-wit:—

(Here insert.)

And that afterwards, to-wit:—On the 17th day of April 1908, the same being the 125th Judicial Day of the November Term, 1907, of said Court, the further following proceedings were had in said cause, to-wit:—

Come the parties by counsel, and the Appellee files its brief on the petition for rehearing heretofore filed by the Appellant, which said brief is in the words and figures following, to-wit:—

(Here insert.)

189 And that afterwards, to-wit:—On the 29th day of April 1908, the same being the 135th Judicial Day of the November Term, 1907, of said Court the further following proceedings were had in said cause, to-wit:—

Come the parties by their attorneys and the Court being advised in the premises, overrules the petition for a rehearing heretofore filed herein by Appellant and orders that the opinion announced in this cause by Hadley, J. on January 28th, 1908, be spread of record, which said opinion is in the words and figures following, to-wit:—(H. I.).

It is therefore considered by the Court that the judgment of the Court below in the above entitled cause be in all things affirmed at the cost of the Appellant.

And it is further considered and adjudged by the Court that the Appellee recover of the Appellant the sum of $— for its costs and charges in this behalf expended.

190 And that afterwards, to-wit:—On the 2nd day of June, 1908, the same being the 8th Judicial Day of the May Term, 1908, of said Court, the further following proceedings were had in said cause to-wit:

Comes now the Cincinnati, Indianapolis and Western Railway Company, the Appellant in the above entitled cause and files its petition for a writ of error in said cause from the Supreme Court of the United States to the Supreme Court of Indiana, which said original petition is made a part of the record in this cause without copying the same and is in the words and figures following, that is to say:

191 In the Supreme Court of Indiana.

No. 21012.

CINCINNATI, INDIANAPOLIS AND WESTERN RAILWAY COMPANY, Appellant,
vs.
CITY OF CONNERSVILLE, Appellee,

Appellant's Petition for a Writ of Error.

The Cincinnati, Indianapolis and Western Railway Company, the appellant in the above entitled cause hereby petitions the Supreme Court of the State of Indiana to grant unto it a writ of error to be issued by the Clerk of the United States Circuit Court for the District of Indiana for the transfer of said cause by writ of error to the Supreme Court of the United States of America for the following reason that is to say:

The said Cincinnati, Indianapolis and Western Railway Company being injured and aggrieved by the judgment and decision of the Supreme Court of Indiana rendered in said cause on the 28th day of January, 1908, and maintaining that said decision and judgment was the result of material error of law prejudicial to it now prays that it be permitted to carry said cause to the said Supreme Court of the United States by writ of error, in the manner provided by law, in order that said judgment of the Supreme Court of
192 Indiana may be examined and reviewed and errors involved therein and leading thereto corrected, if such error there hath been; And said petitioner files herewith its assignment of errors which sets forth separately and particularly each error asserted and to be urged by it in said Supreme Court of the United States.

And said petitioner further prays that a transcript of the record and proceedings in said cause in the Supreme Court of Indiana including the opinion of said Court rendered therein, all duly authenticated, may be sent to said Supreme Court of the United States; and that after such bond as this Court may require has been duly approved a citation in due form be issued and attested by the Chief Justice of this Court.

And your petitioner will ever pray.

Respectfully submitted.

JOHN B. ELAM AND
JAMES W. FESLER,
Att'ys for Appellant.

193 [Endorsed:] Original. In the Supreme Court of Indiana. No. 21,012. Cincinnati, Indianapolis and Western Railway Company, Appellant, vs. City of Connersville, Appellee. Appellant's Petition for a Writ of Error. Filed Jun- 2, 1908. Edward V. Fitzpatrick, Clerk. John B. Elam, James W. Fesler, Att'ys for Appellant.

194 And that afterwards, to-wit: On the 3rd day of June, 1908, the same being the 9th Judicial Day of the May Term, 1908, of said Court, the further following proceedings were had in said cause, to-wit:

Comes now the Cincinnati, Indianapolis and Western Railway Company, the Appellant in the above entitled cause and the Chief Justice of this Court and the associate Judges thereof having examined the petition for a writ of error and the assignment of errors heretofore filed herein do now grant the prayer of said petition and authorize the prosecution of said writ of error and a proper citation to the Appellee herein upon the filing of a bond for the due prosecution of said writ of error in the sum of One Thousand Dollars with surety, to be approved by said Chief Justice. And now the said Cincinnati, Indianapolis and Western Railway Company tenders a writ of error duly issued by the Supreme Court of the United States under the hand of the Clerk of the United States Circuit Court for the District of Indiana and the Seal of said Court and said writ of error is now granted and approved by the Chief Justice and associate justices of the Supreme Court of Indiana and together with such approval written thereon is filed herein and made a part of the record in this cause and the original thereof without copying is made a part of this record and is in the words and figures following, that is to say:

195 UNITED STATES OF AMERICA:

The President of the United States of America to the Honorable the Supreme Court of Indiana, Greeting:

Because on the record and proceedings, as also on the rendition of a judgment in a plea which is in the said Supreme Court, before you, between the Cincinnati, Indianapolis and Western Railway Company, Plaintiff in Error, and the City of Connersville, Defendant in Error, a manifest error hath happened to the great damage of the said Plaintiff in Error, as by *his* complaint appears: and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid on this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 2nd day of July next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said Circuit Court this third day of June, A. D. 1908.

[Seal Circuit Court of the United States, District of Indiana.]

NOBLE C. BUTLER, *Clerk.*

196 [Endorsed:] No. —. Law. Supreme Court of the United States of America. Cincinnati, Indianapolis and Western Railway Company, Plaintiff in Error, v. City of Connersville, Defendant in Error. Writ of Error. A writ of error is allowed as prayed for upon sufficient bond, with surety being filed and approved. Bond fixed at $1000. Jas. H. Jordan, Chief Justice of Supreme Court of Indiana. Filed Jun- 3, 1908. Edward V. Fitzpatrick, Clerk.

197 And the said Cincinnati, Indianapolis and Western Railway Company now tenders its bond for the due prosecution of said writ of error in the sum of One Thousand Dollars with the United States Fidelity and Guaranty Company of Baltimore Maryland as surety thereon, which said bond is examined and approved by the Hon. James H. Jordan, as Chief Justice of the Supreme Court of Indiana, and after such approval is filed in this cause and made a part of the record therein and said bond with said approval is in the words and figures following that is to say:

198 Supreme Court of the United States.

CINCINNATI, INDIANAPOLIS AND WESTERN RAILWAY COMPANY, Plaintiff in Error,

vs.

CITY OF CONNERSVILLE, Defendant in Error.

In Error to the Supreme Court of Indiana.

Know all men by these presents, that, we, the Cincinnati, Indianapolis & Western Railway Company, as principal, and The United States Fidelity & Guaranty Co. as surety, are held and firmly bound unto the above named City of Connersville, defendant in error, in the sum of $1000.00, to be paid to said defendant in error, to which payment, well and truly to be made, we bind ourselves jointly and severally and each of our executors, administrators and assigns jointly by these presents.

Signed and sealed with our seals this 2nd day of June, 1908.

Whereas, the above named plaintiff in error has prosecuted *their* writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled cause by the Supreme Court of the State of Indiana;

Now, therefore, the condition of this obligation is, that if the above named plaintiff in error shall prosecute this said writ of error to effect and answer all costs that may be adjudged or awarded against it, if it shall fail to make good its plea and writ of error, then this
199 obligation to be void; otherwise in full force.

CINCINNATI, INDIANAPOLIS AND WESTERN RAILWAY COMPANY,
By JOHN B. ELAM, *Att'y.*
THE UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE, MARYLAND.
[SEAL.]
By R. A. FOSTER, *Att'y in Fact.*

Taken and approved by me this 3rd day of June, 1908.

JAS. H. JORDAN,
Chief Justice of the Supreme Court of Indiana.

200 And now by order of the Supreme Court of Indiana a citation is issued to the City of Connersville, Appellee in this cause and the defendant in error named in said writ of error under the hand of the Hon. James H. Jordan, Chief Justice of the Supreme Court of Indiana, admonishing said defendant in error to be and appear at the Supreme Court of the United States in the City of Washington thirty days after the date of said citation to show cause if any there be why the judgment of the Supreme Court of Indiana rendered in said cause should not be corrected which said citation was delivered to the agent of said plaintiff in error to be served upon said defendant in error.

201 And that afterwards, to-wit: On the 5th day of June, 1908, the same being the 11th Judicial Day of the May Term, 1908, of said Court the further following proceedings were had in said cause to-wit:

Comes now the Cincinnati, Indianapolis and Western Railway Company the Appellant and plaintiff in error in the above entitled cause and files herein the citation heretofore issued in said cause under the hand of the Chief Justice of the Supreme Court of Indiana with the affidavit of Harvey J. Elam as agent of said Appellant and plaintiff in error endorsed thereon showing service thereof on the Appellee and defendant in error herein, which said citation with said affidavit are now made a part of the record in this cause without copying the same and are in the words and figures following that is to say:

202 Law.

UNITED STATES OF AMERICA, *ss:*

To the City of Connersville, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the City of Washington thirty days after the date hereof, pursuant to a writ of error, filed in the Clerk's office of the Supreme Court of the State of Indiana, wherein the Cincinnati, Indianapolis and Western Railway Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. James H. Jordan, Chief Justice of the Supreme Court of the State of Indiana, this 3rd day of June, in the year of our Lord, one thousand nine hundred and eight.

JAS. H. JORDAN,
Chief Justice Supreme Court of Indiana.

203 On this 4th day of June in the year of our Lord, one thousand nine hundred and eight personally appeared Harvey J. Elam before me, the subscriber, a Notary Public in and for the County of Marion and State of Indiana, and makes oath that he as agent for the within named plaintiff in error, delivered a true copy of the within citation to Frederick I. Barrow Mayor of the City of Connersville, the within named defendant in error and also a like copy to Richard M. Elliott, Attorney for the said City and also read said citation to each of said persons.

HARVEY J. ELAM.

Sworn to and subscribed the 4th day of June, A. D. 1908.

[Seal Notary Public, Indiana.]

NINA E. SCHMIDT,
Notary Public.

My commission expires May 9, 1911.

[Endorsed:] No. —. Law. Supreme Court of the United States of America. Cincinnati, Indianapolis and Western Railway Company, Plaintiff in Error, v. City of Connersville, Defendant in Error. Citation to Defendant in Error.

204 And said Appellant also files with said petition its assignment of errors in the Supreme Court of the United States, which said original assignment of errors is made a part of the record in this cause without copying the same and is in the words and figures following that is to say:

205 In the Supreme Court of the United States.

CINCINNATI, INDIANAPOLIS AND WESTERN RAILWAY COMPANY,
Plaintiff in Error,
vs.
CITY OF CONNERSVILLE, Defendant in Error.

In the Matter of the Writ of Error of the CINCINNATI, INDIANAPOLIS AND WESTERN RAILWAY COMPANY, Plaintiff in Error, to the Supreme Court of Indiana.

Assignment of Errors.

The Cincinnati, Indianapolis & Western Railway Company as plaintiff in error in the above entitled cause for its assignment of errors in the Supreme Court of the United States says:

That in the record and proceedings in the above entitled cause there is manifest error harmful to said plaintiff in error in each of the following several particulars that is to say:

1. The Supreme Court of Indiana erred in adjudging that the Circuit Court of Henry County, Indiana, being the trial Court where said cause was tried by jury did not not err in giving to said jury in-

struction number nine of the series of instructions given by
206 said trial court on its own motion and which said instruction is as follows, that is to say:

"9. Under the statutes of this state it is the duty of all railroad companies to construct and keep in safe and good condition all highway crossings, and this duty is the same whether the highway was established before or after the railroad was built."

2. The Supreme Court of Indiana erred in adjudging that the Circuit Court of Henry County, Indiana, being the trial Court where said cause was tried by jury did not err in giving to said jury instruction number ten of the series of instructions given by said trial court on its own motion and which said instruction is as follows, that is to say:

"10. The law also requires a railroad company to keep its railroad and right of way in a reasonably safe condition for the transportation of passengers and freight, and therefore in the opening of the street proposed, the excavation and removal of the embankment through which the proposed street will pass, and the expense thereof, will be imposed upon the railroad company."

3. The Supreme Court of Indiana erred in adjudging that the Circuit Court of Henry County, Indiana, being the trial Court where said cause was tried by jury did not err in giving to said jury instruction number eleven of the series of instructions given by said trial court on its own motion and which said instruction is as follows, that is to say:

"11. If under the evidence in this cause and the law applicable thereto as given to you by the court, you should find that the defendant railroad company is entitled to any damages, then, in determining the amount of such damages, you should take into consideration the value of any land of the defendant actually taken and appropriated, if any, the value of the embankment necessarily taken, if any, and the cost of the removal of embankment, if any, as shown by a fair preponderance of the evidence, and the sum of these items would constitute the full measure of defendant's damages."

4. The Supreme Court of Indiana erred in adjudging that the Circuit Court of Henry County, Indiana, being the trial court where said cause was tried by jury did not err in giving to said jury
207 instruction number twelve of the series of instructions given by said trial court on its own motion and which said instruction is as follows, that is to say:

"12. It being the duty of the defendant railroad company to construct and keep in safe and good condition all highway crossings, the defendant in this action would not be entitled to any damages for constructing the necessary crossing nor abutments and bridge for supporting its railroad over and across said street when constructed."

5. The Supreme Court of Indiana erred in adjudging and affirming that the Circuit Court of Henry County, Indiana, being the trial Court where said cause was tried by jury, did not err in refusing to give to said jury instruction numbered one of the series of instructions requested by this plaintiff in error, being then the defendant

in the cause so tried by said jury, and which instruction is as follows, that is to say:

"1. If under the evidence in this cause and the law applicable thereto as given you by the court, you should find that the defendant railway company is entitled to any damages, then, in determining the amount of such damages, you should consider the character of the property, if any, belonging to the defendant appropriated for the proposed street, and the use to which said property has been and is devoted by the defendant, its fitness or unfitness for such use, and award such damages as will fairly compensate the defendant for such property."

6. The Supreme Court of Indiana erred in adjudging and affirming that the Circuit Court of Henry County, Indiana, being the trial Court where said cause was tried by jury, did not err in refusing to give to said jury instruction numbered two of the series of instructions requested by this plaintiff in error, being then the defendant in the cause so tried by said jury, and which instruction is as follows, that is to say:

"2. If property is taken for public use that has a peculiar value to the owner on account of its being devoted and adapted to a particular use then such owner should be compensated for its taking by assessing his damages at such value."

208 7. The Supreme Court of Indiana erred in adjudging and affirming that the Circuit Court of Henry County, Indiana, being the trial court where said cause was tried by jury, did not err in refusing to give to said jury instruction numbered three of the series of instructions requested by this plaintiff in error, being then the defendant in the cause so tried by said jury, and which instruction is as follows, that is to say:

"3. When property is taken for public use that by its situation or its relation to other property of the owner, or its fitness for use in connection with and as a part of one entire piece of property owned by the same owner, has a peculiar value and such value is shown then it becomes the basis for assessing damages; and this is true even though it has less general market value. An owner so situated is not entitled to fanciful or sentimental damages, but he is entitled to such damages as will fairly compensate him for the loss he sustains in having his property appropriated for the public use even though it might be worth less or even nothing at all to any other person."

8. The Supreme Court of Indiana erred in adjudging and affirming that the Circuit Court of Henry County, Indiana, being the trial court where said cause was tried by jury, did not err in refusing to give to said jury instruction numbered four of the series of instructions requested by this plaintiff in error, being then the defendant in the cause so tried by said jury, and, which instruction is as follows, that is to say:

"4. Applying these rules to the case on trial the court instructs you that in determining the amount of the defendant's damages, if you should find it entitled to any, you should consider the value of any of its property taken as used in connection with its line of rail-

road and as a structural part thereof and for the use to which it is devoted by the defendant and for which it or its predecessors in interest have fitted it."

9. The Supreme Court of Indiana erred in adjudging and affirming that the Circuit Court of Henry County, Indiana, being the trial court where said cause was tried by jury, did not err in refusing to give to said jury instruction numbered five of the series of
209 instructions requested by this plaintiff in error, being then the defendant in the cause so tried by said jury, and, which instruction is as follows, that is to say:

"5. When a street is opened through the right of way of a railroad company such company is not limited, when seeking compensation, to damages for the use of the land occupied by the street, but the damages awarded should include any extra expense that necessarily and proximately results from such opening in making structural changes in the property of the railroad company in order that it may be operated as a railroad, but expenses made necessary for the sole purpose of complying with the police regulations of the state or city should not be included."

10. The Supreme Court of Indiana erred in adjudging and affirming that the Circuit Court of Henry County, Indiana, being the trial court where said cause was tried by jury, did not err in refusing to give to said jury instruction numbered six of the series of instructions requested by this plaintiff in error, being then the defendant in the cause so tried by said jury, and, which instruction is as follows, that is to say:

"6. If the appropriation of the defendant's property under the proceedings set forth in this case will necessarily and proximately cause expense to the defendant in constructing a bridge to carry its railroad over the proposed street in order that its railroad tracks may have support and its railroad may be operated as such, and as an entire line, and such construction of said bridge will be required for no other purpose then, in determining the defendant's damages, you should consider the expense of constructing such bridge."

11. The Supreme Court of Indiana erred in adjudging and affirming that the Circuit Court of Henry County, Indiana, being the trial court where said cause was tried by jury, did not err in refusing to give to said jury instruction numbered seven of the series of instructions requested by this plaintiff in error, being then the defendant in the cause so tried by said jury, and, which instruction is as follows, that is to say:

"7. If you find from the evidence that the establishment and opening of the street in question will necessarily take a certain portion of the defendant's right of way and necessitate the removal of an embankment thereon, if any, constituting a part of the defendant's roadbed, the defendant would be entitled to recover the reasonable value of said land so taken, if any, and the embankment thereon, if any, and in determining the value thereof you should consider their value for the uses to which they are adapted and for

which they are used and fix their value for the uses and purposes to which they are adapted and for which they are used."

210 12. The Supreme Court of Indiana erred in adjudging and affirming that the Circuit Court of Henry County, Indiana, being the trial court where said cause was tried by jury, did not err in refusing to give to said jury instruction numbered eight of the series of instructions requested by this plaintiff in error, being then the defendant in the cause so tried by said jury, and which instruction is as follows, that is to say:

"8. If the defendant's railroad as constructed and used without the proposed street being opened is and may be operated at the point where it is proposed to open said street and would be equally so if carried across the street upon an overhead bridge, but such operation would be no more safe for the public after such change than before, then such change would not be made in compliance with or on account of any police regulation, but would be a structural change for which damages should be allowed in this action."

13. The Supreme Court of Indiana erred in adjudging and affirming that the Circuit Court of Henry County, Indiana, being the trial court where said cause was tried by jury, did not err in refusing to give to said jury instruction numbered nine of the series of instructions requested by this plaintiff in error, being then the defendant in the cause so tried by said jury, and which instruction is as follows, that is to say:

"9. Where a street is opened and established across a railroad right of way already constructed not in the line or location of any pre-existing street or highway, the railroad is not entitled to recover as damages for anything required of it under the police regulation, such as providing necessary planking, cattle guards, wing fences, gates, signals, and the like, but it would be entitled to compensation for the value of any lands actually taken, embankments necessarily destroyed and carried away and the necessary costs of restoring its right of way to its original usefulness."

14. The Supreme Court of Indiana erred in affirming the judgment rendered by the Henry Circuit Court, being the Circuit Court of Henry County, Indiana, in said cause.

211 15. The Supreme Court of Indiana erred in holding and adjudging that the Plaintiff in Error's measure of damages was limited to the value of any land actually taken plus the value of the embankment necessarily taken and the cost of removing such embankment and that it was entitled to recover no damages on account of the special value of the embankment to the Plaintiff in Error by reason of its being used as a part of its railroad track and by reason of the use to which it was especially adapted and devoted.

16. Said court erred in deciding and adjudging that Section 5153 of Burns' Annotated Statutes of 1901, requiring a railroad company to restore a highway intersected by its railroad track to its former state or in a sufficient manner not to unnecessarily impair its usefulness was applicable to the case before the court and controlled its decision.

17. The said court erred in deciding and adjudging that the rules

of law applicable to a highway crossing and its construction and protection apply to and govern the case here presented by this Plaintiff in Error wherein a structure erected to carry its track is destroyed in the opening of a proposed highway.

18. The said court erred in holding and adjudging that the police power authorizes the taking or destruction of property without compensation for the mere purpose of providing a more convenient highway, or opening an additional street in a city where there are already other streets nearby crossing the right of way of the Railroad
212 Company, the property of which is so taken.

19. The said court erred in holding and adjudging that the protection of highway crossings, where they cross Railroads, for the purpose of preventing collisions and like accidents incident to such crossings has any application to the taking and destruction of an embankment where no highway exists and solely for the purpose of opening a new one, there being at the time proceedings for that purpose are begun no highway crossing at the point in question and no occasion to protect anybody from accident there, and that this consideration should in any way effect the measure of damages in this proceeding.

20. The said court erred in holding and adjudging that when the street in question was once extended over Plaintiff in Error's right of way then whatever was necessary under Section 5135 Burns' Annotated Statutes, 1901, to construct and maintain the crossing must be done and that what was so necessary could not be considered in determining the measure of damages for the taking and destruction of the embankment to be taken and destroyed by the extension of the street and that the Defendant in Error could first extend the street of its own motion and then insist that a condition had been so created that it was excused from paying the Plaintiff in Error the value of its property taken for the use to which it was devoted and for which it was adapted.

Wherefore, the said Cincinnati, Indianapolis & Western Railway Company, Plaintiff in Error as aforesaid prays that the judgment of the said Supreme Court of Indiana rendered in this cause
213 be in all things reversed and that the said Supreme Court of Indiana be ordered to enter a judgment reversing the judgment of the Henry Circuit Court from which this Plaintiff in Error prosecuted its appeal in this cause to the Supreme Court of Indiana.

JOHN B. ELAM,
JAMES W. FESLER, AND
HARVEY J. ELAM,
Att'ys for Plaintiff in Error.

214 [Endorsed:] Original. In the Supreme Court of the United States. Cincinnati, Indianapolis and Western Railway Company, Plaintiff in Error, vs. City of Connersville, Defendant in Error. In the Matter of the Writ of Error of the Cincinnati, Indianapolis and Western Railway Company, Plaintiff in Error to the Supreme Court of Indiana. Assignment of Errors. Filed Jun 2, 1908. Edward V. Fitzpatrick, clerk. John B. Elam, James W. Fesler, Att'ys for Plaintiff.

215 STATE OF INDIANA,
In the Supreme Court:

I, Edward V. Fitzpatrick, Clerk of the Supreme Court of the State of Indiana, by virtue of the foregoing writ of error and in obedience thereto hereby certify that the within and foregoing is a true and complete transcript of the record of the proceedings had, papers filed, (except briefs) motions decided, rulings made, opinions delivered, judgments rendered and all decrees and orders entered in the Supreme Court of the State of Indiana, in cause numbered 21,012, and entitled Cincinnati, Indianapolis and Western Railway Company vs. City of Connersville appealed from the Henry Circuit Court; also the original petition for a writ of error and assignment of errors in the Supreme Court of the United States filed therewith writ of error from the Supreme Court of the United States to the Supreme Court of the State of Indiana, with the allowance thereof: the original citation of the defendant in error and proof of service thereof: a copy of the original bond and its approval by Hon. James H. Jordan as Chief Justice of the Supreme Court of Indiana.

Which said transcript annexed thereto together with the said original petition for a writ of error and the assignment of errors in the Supreme Court of the United States filed therewith the original writ of error, original citation with affidavit of service thereof and copy of original bond all attached to said transcript, I hereby certify as and for my full return to said writ of error.

In witness whereof, I have hereunto set my hand and the seal of said Supreme Court at my office in the State House of Indiana, this 23rd day of June, 1908.

[Seal Supreme Court, State of Indiana.]

EDWARD V. FITZPATRICK,
Clerk Supreme Court of Indiana.

Endorsed on cover: File No. 21,246. Indiana supreme court. Term No. 190. Cincinnati, Indianapolis & Western Railway Company, plaintiff in error, vs. City of Connersville. Filed July 1st, 1908. File No. 21,246.

—IN THE—

Supreme Court of the United States

October Term, 1909.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

CINCINNATTI, INDIANAPOLIS AND WESTERN RAILWAY COMPANY,
Plaintiff in Error,
v.
CITY OF CONNERSVILLE,
Defendant in Error.

No. 190.

21246.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The Cincinnati, Indianapolis and Western Railway Company, plaintiff in error and its predecessors in right have since the year 1869, lawfully maintained an embankment about fifteen feet high running east and west through what is now the City of Connersville upon which the tracks of its main line are laid. The railway company owns the right of way but not the fee. A street established after the railroad embankment was constructed in the City of Connersville called Grand avenue runs north and south. The southern part of this street stops at the south side of

the railway embankment and the northern part of the street stops at the northern line of the railway embankment. The street has never been opened across the railway right of way. In the year 1904 the City of Connersville in order to connect the two parts of Grand avenue undertook, by appropriate proceedings brought under its eminent domain power, to condemn the intervening portion of the railway right of way, and open up Grand avenue across the railway right of way. The right to condemn and the necessity for some compensation are conceded. The question to be presented to this court is, what compensation should be paid by the city. If the street is opened it will be necessary for the railway company to construct a bridge across it at an expense of about $12,000. The plaintiff in error contends that the cost of constructing and maintaining this bridge is an element of damage that should be considered in determining the value of the embankment to be condemned and the compensation to be paid by the City of Connersville. The trial court refused to so instruct the jury and an award of $800 was made in favor of the railway company based on various other items of damage not here in question. The Supreme Court of Indiana affirmed the action of the trial court. The plaintiff in error has brought a writ of error to this court on the ground that under the fourteenth amendment to the Constitution of the United States, its property can not be taken unless compensation is made. The plaintiff in error contends that compensation is not made and the constitutional provision is not given proper force unless the expense incident to the construction and

maintainance of the bridge is considered in assessing damages. This is the only question involved in the case.

The one question involved is raised in several different ways. The railway company's fourth exception to the report of the city commissioners was on the ground that nothing had been allowed on account of the cost of building the necessary bridge. The court sustained a demurrer to this exception. The trial court also by its instructions given numbered eight to twelve told the jury that nothing should be given as damages on account of the cost of the bridge. The instructions requested by the railway company were in effect that the jury should consider the cost of the bridge in awarding damages. These instructions were all refused. In each instance appropriate steps were taken to present the question to the Supreme Court of Indiana. The Supreme Court of Indiana denied any relief and in its opinion expressly held that the fourteenth amendment to the Constitution of the United States was not applicable to the case.

ASSIGNMENT OF ERRORS.

The plaintiff in error assigns and relies upon the following errors each of which assignments presents in a somewhat different way the one question above stated.

The Cincinnati, Indianapolis & Western Railway Company as plaintiff in error in the above entitled cause for its assignment of errors in the Supreme Court of the United States, says:

That in the record and proceedings in the above entitled cause there is manifest error harmful to said plaintiff in

error in each of the following several particulars that is to say:

1. The Supreme Court of Indiana erred in adjudging that the Circuit Court of Henry county, Indiana, being the trial court where said cause was tried by jury did not err in giving to said jury instruction number nine of the series of instructions given by said trial court on its own motion and which instruction is as follows, that is to say:

"9. Under the statutes of this state it is the duty of all railroad companies to construct and keep in safe and good condition all highway crossings, and this duty is the same whether the highway was established before or after the railroad was built."

2. The Supreme Court of Indiana erred in adjudging that the Circuit Court of Henry county, Indiana, being the trial court where said cause was tried by jury did not err in giving to said jury instruction number ten of the series of instructions given by said trial court on its own motion and which said instruction is as follows, that is to say:

"10. The law also requires a railroad company to keep its railroad and right of way in a reasonably safe condition for the transportation of passengers and freight, and therefore in the opening of the street proposed, the excavation and removal of the embankment through which the proposed street will pass, and the expense thereof, will be imposed upon the railroad company."

3. The Supreme Court of Indiana erred in adjudging that the Circuit Court of Henry county, Indiana, being the trial court where said cause was tried by jury did not err in giving to said jury instruction number eleven of the series of instructions given by said trial court on its own motion and which said instructon is as follows, that is to say:

"11. If under the evidence in this cause and the law

applicable thereto as given to you by the court, you should find that the defendant railroad company is entitled to any damages, then, in determining the amount of such damages, you should take into consideration the value of any land of the defendant actually taken and appropriated, if any, the value of the embankment necessarily taken, if any, and the cost of the removal of embankment, if any, as shown by a fair preponderance of the evidence, and the sum of these items would constitute the full measure of defendant's damages."

4. The Supreme Court of Indiana erred in adjudging that the Circuit Court of Henry county, Indiana, being the trial court where said cause was tried by jury did not err in giving to said jury instruction number twelve of the series of instructions given by said trial court on its own motion and which said instruction is as follows, that is to say:

"12. It beng the duty of the defendant railroad company to construct and keep in safe and good condition all highway crossings, the defendant in this action would not be entitled to any damages for construcing the necessary crossing nor abutments and bridge for supporting its railroad over and across said street when constructed."

5. The Supreme Court of Indiana erred in adjudging and affirming that the Circuit Court of Henry county, Indiana, being the trial court where said cause was tried by jury, did not err in refusing to give to said jury instruction numbered one of the series of instructions requested by this plaintiff in error, being then the defendant in the cause so tried by said jury, and which instruction is as follows, that is to say:

"1. If under the evidence in this cause and the law applicable thereto as given you by the court, you should find that the defendant railway company is entitled to any damages, then, in determining the amount of such damages, you should consider the character of the property, if

any, belonging to the defendant appropriated for the proposed street, and the use to which said property has been and is devoted by the defendant, its fitness or unfitness for such use, and award such damages as will fairly compensate the defendant for such property."

6. The Supreme Court of Indiana erred in adjudging and affirming that the Circuit Court of Henry county, Indiana, being the trial court where said cause was tried by jury, did not err in refusing to give to said jury instruction numbered two of the series of instructions requested by this plaintiff in error, being then the defendant in the cause so tried by said jury, and which instruction is as follows, that is to say:

"2. If property is taken for public use that has a peculiar value to the owner on account of its being devoted and adapted to a particular use then such owner should be compensated for its taking by assessing his damages at such value."

7. The Supreme Court of Indiana erred in adjudging and affirming that the Circuit Court of Henry county, Indiana, being the trial court where said cause was tried by jury, did not err in refusing to give to said jury instruction numbered three of the series of instructions requested by this plaintiff in error, being then the defendant in the cause so tried by said jury, and which instruction is as follows, that is to say:

"3. When property is taken for public use that by its situation or its relation to other property of the owner, or its fitness for use in connection with and as a part of one entire piece of property owned by the same owner, has a peculiar value and such value is shown then it becomes the basis for assessing damages; and this is true even though it has less general market value. An owner so situated is not entitled to fanciful or sentimental damages, but he is entitled to such damages as will fairly compensate him for

the loss he sustains in having his property appropriated for the public use even though it might be worth less or even nothing at all to any other person."

8. The Supreme Court of Indiana erred in adjudging and affirming that the Circuit Court of Henry county, Indiana, being the trial court where said cause was tried by jury, did not err in refusing to give to said jury instruction numbered four of the series of instructions requested by this plaintiff in error, being then the defendant in the cause so tried by said jury, and which instruction is as follows, that is to say:

"4. Applying these rules to the case on trial the court instructs you that in determining the amount of the defendant's damages, if you should find it entitled to any, you should consider the value of any of its property taken as used in connection with its line of railroad and as a structural part thereof and for the use to which it is devoted by the defendant and for which it or its predecessors in interest have fitted it."

9. The Supreme Court of Indiana erred in adjudging and affirming that the Circuit Court of Henry county, Indiana, being the trial court where said cause was tried by jury, did not err in refusing to give to said jury instruction numbered five of the series of instructions requested by this plaintiff in error, being then the defendant in the cause so tried by said jury, and which instruction is as follows, that is to say:

"5. When a street is opened through the right of way of a railroad company such company is not limited, when seeking compensation, to damages for the use of the land occupied by the street, but the damages awarded should include any extra expense that necessarily and proximately results from such opening in making structural changes in the property of the railroad company in order that it may be operated as a railroad, but expenses made neces-

sary for the sole purpose of complying with the police regulations of the state or city should not be included."

10. The Supreme Court of Indiana erred in adjudging and affirming that the Circuit Court of Henry County, Indiana, being the trial court where said cause was tried by jury, did not err in refusing to give to said jury instruction numbered six of the series of instructions requested by this plaintiff in error, being then the defendant in the cause so tried by said jury, and which instruction is as follows, that is to say:

"6. If the appropriation of the defendant's property under the proceedings set forth in this case will necessarily and proximately cause expense to the defendant in constructing a bridge to carry its railroad over the proposed street in order that its railroad tracks may have support and its railroad may be operated as such, and as an entire line, and such construction of said bridge will be required for no other purpose then, in determining the defendant's damages, you should consider the expense of constructing such bridge."

11. The Supreme Court of Indiana erred in adjudging and affirming that the Circuit Court of Henry county, Indiana, being the trial court where said cause was tried by jury, did not err in refusing to give to said jury instruction numbered seven of the series of instructions requested by this plaintiff in error, being then the defendant in the cause so tried by said jury, and which instruction is as follows, that is to say:

"7. If you find from the evidence that the establishment and opening of the street in question will necessarily take a certain portion of the defendant's right of way and necessitate the removal of an embankment thereon, if any, constituting a part of the defendant's roadbed, the defendant would be entitled to recover the reasonable value of said land so taken, if any, and the embankment thereon,

if any, and in determining the value thereof you should consider their value for the uses to which they are adapted and for which they are used and fix their value for the uses and purposes to which they are adapted and for which they are used."

12. The Supreme Court of Indiana erred in adjudging and affirming that the Circuit Court of Henry county, Indiana, being the trial court where said cause was tried by jury, did not err in refusing to give to said jury instruction numbered eight of the series of instructions requested by this plaintiff in error, being then the defendant in the cause so tried by said jury, and which instruction is as follows, that is to say:

"8. If the defendant's railroad as constructed and used without the proposed street being opened is and may be operated at the point where it is proposed to open said street and would be equally so if carried across the street upon an overhead bridge, but such operation would be no more safe for the public after such change than before, then such change would not be made in compliance with or on account of any police regulation, but would be a structural change for which damages should be allowed in this action."

13. The Supreme Court of Indiana erred in adjudging and affirming that the Circuit Court of Henry county, Indiana, being the trial court where said cause was tried by jury, did not err in refusing to give to said jury instruction numbered nine of the series of instructions requested by this plaintiff in error, being then the defendant in the cause so tried by said jury, and which instruction is as follows, that is to say:

"9. Where a street is opened and established across a railroad right of way already constructed not in the line or location of any pre-existing street or highway, the railroad is not entitled to recover as damages for any thing

required of it under the police regulation, such as providing necessary planking, cattle guards, wing fences, gates, signals, and the like, but it would be entitled to compensation for the value of any lands actually taken, embankments necessarily destroyed and carried away and the necessary costs of restoring its right of way to its original usefulness."

14. The Supreme Court of Indiana erred in affirming the judgment rendered by the Henry Circuit Court, being the Circuit Court of Henry county, Indiana, in said cause.

15. The Supreme Court of Indiana erred in holding and adjudging that the plaintiff in error's measure of damages was limited to the value of any land actually taken plus the value of the embankment necessarily taken and the cost of removing such embankment and that it was entitled to recover no damages on account of the special value of the embankment to the plaintiff in error by reason of its being used as a part of its railroad track and by reason of the use to which it was especially adapted and devoted.

16. Said court erred in deciding and adjudging that Section 5153 of Burns' Annotated Statutes of 1901, requiring a railroad company to restore a highway intersected by its railroad track to its former state or in a sufficient manner not to unnecessarily impair its usefulness was applicable to the case before the court and controlled its decision.

17. The said court erred in deciding and adjudging that the rules of law applicable to a highway crossing and its construction and protection apply to and govern the case here presented by this plaintiff in error wherein a structure erected to carry its track is destroyed in the opening of a proposed highway.

18. The said court erred in holding and adjudging that the police power authorizes the taking or destruction of property without compensation for the mere purpose of providing a more convenient highway, or opening an additional street in a city where there are already other streets near by crossing the right of way of the Railroad Company, the property of which is so taken.

19. The said court erred in holding and adjudging that the protection of highway crossings, where they cross railroads, for the purpose of preventing collisions and like accidents incident to such crossings has any application to the taking and destruction of an embankment where no highway exists and solely for the purpose of opening a new one, there being at the time proceedings for that purpose are begun no highway crossing at the point in question and no occasion to protect anybody from accident there, and that this consideration should in any way effect the measure of damages in this proceeding.

20. The said court erred in holding and adjudging that when the street in question was once extended over plaintiff in error's right of way then whatever was necessary under Section 5135 Burns' Annotated Statutes, 1901, to construct and maintain the crossing must be done and that what was so necessary could not be considered in determining the measure of damages for the taking and destruction of the embankment to be taken and destroyed by the extension of the street and that the defendant in error could first extend the street of its own motion and then insist that a condition had been so created that it was excused from paying the plaintiff in error the value of its

property taken for the use to which it was devoted and for which it was adapted.

Wherefore, the said Cincinnati, Indianapolis & Western Railway Company, Plaintiff in Error as aforesaid prays that the judgment of the said Supreme Court of Indiana rendered in this cause be in all things reversed and that the said Supreme Court of Indiana be ordered to enter a judgment reversing the judgment of the Henry Circuit Court from which this Plaintiff in Error prosecuted its appeal in this cause to the Supreme Court of Indiana.

BRIEF OF ARGUMENT.

1. A right was claimed under the United States Constitution and the highest court of Indiana in its opinion expressly denied that right, hence this court has jurisdiction.

Montana ex rel. Haric v. Rice, 204 U. S. 291;
San Jose Land, etc., v. San Jose Ranch Co., 189 U. S. 177;
Green Bay, etc., v. Patten, 172 U. 58;
Transcript p. 114.

2. The fourteenth amendment to the constitution requires that when property is taken by power of eminent domain compensation must be made to the owner.

Chicago B. & Q., etc., v. Chicago, 166 U. S. 226.

3. When part of an entire property is taken under the power of eminent domain, the owner is entitled to compensation on account of what is taken and also for injury to what remains.

Chicago, etc., Co. v. Huncheon, 130 Ind. 529;
Chicago, etc., Co. v. Hunter et al., 128 Ind. 213;
White v. Chicago, etc., Co., 122 Ind. 317;
Rehman v. New Albany, etc., Co., 8 Ind. App. 200.

4. The measure of damages is the difference between the value of the entire property before the appropriation and of what remains immediately after such appropriation.

Sidener v. Essex, 22 Ind. 201;
Fifer v. Ritter, 159 Ind. 8;
Louisville, etc., Co. v. Sparks, 12 Ind. App. 410;

Sunnyside, etc., Co. v. Reitz, 14 Ind. App. 478;

Lake Erie, etc., Co. v. Lee, 14 Ind. App. 328.

5. When part of an entire property is taken under the power of eminent domain, the owner must be compensated for what is taken and for damages to that which remains, and unless this is done, such owner is deprived of his property without just compensation, without due process of law, and is denied the equal protection of the laws within the meaning of the fifth and fourteenth amendments to the constitution of the United States.

In re Opening, etc., (Mich.) 26 N. W. 159;

Village, etc., v. Pere Marquette, etc., Co., (Mich.) 102 N. W. 947;

Chicago, etc., Co. v. Springfield, etc., Co., 67 Ill. 142;

St. Louis, etc., Co. v. Springfield, etc., Co., 96 Ill. 274;

Chicago, etc., Co. v. Jacobs, 110 Ill. 414;

Robb v. Maysville, etc., Co., 60 Ky. 117;

Lake Shore, etc., Co. v. Chicago, etc., Co., 100 Ill. 21;

Chicago, etc., Co. v. Chicago, 166 U. S. 226;

Commissioners v. Michigan, etc., Co., (Mich.) 51 N. W. 934;

Commissioners v. Canada, etc., Co., (Mich.) 51 N. W. 447.

6. When property of a railroad company is taken for another public use, the same rules as to compensation apply as in the case of an individual owner.

Lake Shore, etc., Co. v. Chicago, etc., Co., 100 Ill. 21, pt. 31;

Chicago, etc., Co. v. Englewood, etc., Co., 115 Ill. 375, pt. 384.

7. When property that has a peculiar value to the owner on account of its being devoted and adapted to a particular use is taken for a public use the owner should be compensated for such taking by assessing damages at such value.

Ohio Valley, etc., Co. v. Keith, 130 Ind. 314;
Lake Shore, etc., Co. v. Chicago, etc., Co., 100 Ill. 21;
Chicago, etc., Co. v. Jacobs, 110 Ill. 414;
Price v. St. Paul, etc., Co., 27 Wis. 98;
King v. Minneapolis, etc., Co., 32 Minn. 224;
Dupuis v. Chicago, etc., Co., 115 Ill. 97;
Chicago, etc., Co. v. Chicago, etc., Co., 112 Ill. 589;
Denver, etc., Co. v. Griffith, (Colo.) 31 Pac. 171;
Cincinnati, etc., Co. v. Longworth, 30 O. St. 108;
Shenango, etc., Co. v. Braham, 79 Pa. St. 447;
4 Suth. on Damages, Sec. 1074.

8. When a street is opened through an existing embankment of earth constituting a part of the property and right of way of a railroad company and supporting its railroad track, in determining the damages so caused to the railroad company it is not limited to the value of the land taken or the cost of the embankment but the damages awarded should include the expense of any structural changes in the property of the company necessarily and

proximately resulting from such removal of its embankment and the support of its track.

Baltimore, etc., v. State ex rel, 159 Ind. 510;
Cincinnati, etc., Co. v. City, 68 O. St. 510;
City v. Grand Rapids, etc., Co., (Mich.) 33 N. W. 15;
Village, etc., v. Pere Marquette, etc., Co., (Mich.) 102 N. W. 947;
In re Opening, etc., (Mich.) 26 N. W. 159;
Chicago, etc., Co. v. Springfield, etc., Co., 67 Ill. 142;
St. Louis, etc., Co. v. Springfield, etc., Co., 96 Ill. 274;
Lake Shore, etc., Co. v. Chicago, etc., Co., 100 Ill. 21;
Colusa County v. Hudson, 85 Cal. 633;
Terre Haute, etc., Co. v. Crawford, 100 Ind. 550;
Lake Erie, etc., Co. v. Commissioners, 63 O. S. 23;
Morris, etc., Co. v. City, (N. J.) 43 Atl. 730.

9. When a railroad company has a track upon an embankment of earth which is so situated and of such a character that it can and does operate its trains on it with entire safety to the public, and a city opens a new street through such embankment, passing under such track, requiring the removal of the embankment and the substitution of a bridge to carry such track over such street, which when constructed will in no way add to the safety or convenience of operating trains, then the construction of such bridge does not involve an expense that the railroad com-

pany can be required to incur under the exercise of the police power. And if its damages caused by such street opening do not include the expense of such structure, then its property is taken without just compensation and without due process of law. The trial court should have instructed the jury as requested by the defendant upon this subject.

Cincinnati, etc., Co. v. City, 68 O. St. 510;
Lake View v. Rose, etc., Co., 70 Ill. 191;
Ritchie v. People, 155 Ill. 98;
Chicago, etc., Co. v. City, 140 Ill. 309;
Morris, etc., Co. v. City, (N. J.) 43 Atl. 730;
Lake Erie, etc., Co. v. Shelley, 163 Ind. 36;
Chicago, etc., Co. v. People, 200 U. S. 561;
Lewis on Eminent Domain, Sec. 6.

10. The following authorities are to be distinguished:

Chicago B. & Q. R. R. Co. v. Chicago, 166 U. S. 226;
Chicago, etc., v. People ex rel. Drainage Commissioners, 200 U. S. 561;
Northern, etc., Co. v. Minnesota, 208 U. S. 583;
Lake Erie, etc., v. Shelley, 163 Ind. 36;
Southern Indiana Railway Company v. McCarrell, 163 Ind. 469;
Chicago, etc., v. State, 158 Ind. 189;
Chicago, etc., v. Zimmerman, 158 Ind. 189;
Vandalia, etc., v. State ex rel., 166 Ind. 219;
Chicago, etc., v. State, 159 Ind. 237.

11. The statute of the state of Indiana upon which the Supreme Court of Indiana relied in deciding this case and which that court treated as compelling the building of the

bridge here involved without compensation can not be so construed without making it conflict with the fourteenth amendment to the constitution of the United States because the statute would be applied where there is no occasion for the police power to act. The statute is as follows:

5153. (3903.) General powers. 13. Every such (railroad) corporation shall possess the general powers, and be subject to the liabilities and restrictions expressed in the special powers following.

Fifth. To construct its road upon or across any stream of water, water-course, road, highway, railroad or canal, so as not to interfere with the free use of the same, which the route of its road shall intersect, in such manner as to afford security for life and property; but the corporation shall restore the stream or water-course, road or highway, thus intersected, to its former state, or in a sufficient manner not to innecessarily impair its usefulness or injure its franchises.

2 Burns' R. S. 1901, Section 5153;

State ex rel. v. Indianapolis, etc., 160 Ind. 145.

ARGUMENT.

The right of the City of Connersville to open Grand avenue through the embankment constituting a part of the appellant's right of way is conceded. The form of the proceeding by which this is to be done also concedes that the city seeks to accomplish its purpose by exercising the power of eminent domain. In such a proceeding the right to recover damages is admitted, and apraisers appointed by the city authorities assessed the damages at one hundred and fifty dollars. Upon the trial the only question was as to damages and the amount was then fixed at eight hundred dollars. In this court, therefore, no question except as to the amount of damages is presented for consideration. The plaintiff in error insists that under the constitution of the United States and also under decided cases these damages should be compensatory. It must be conceded that the damages awarded by the jury for which appellant had judgment in the circuit court are not compensatory.

The case was tried upon the theory that while the proceeding was one under the power of eminent domain yet as to the principal element of damages plaintiff in error could recover nothing because of an application of what is called the police power of the city. That a portion of such police power has been delegated to the City of Connersville for particular purposes is not denied but we maintain here that this power cannot be resorted to for the purpose of denying the plaintiff in error just compensation for its property taken. This principal question in the cause is presented upon the record in different ways. The defend-

ant's fourth exception to the report of the city commissioners alleges that their assessment of damages was inadequate: "because the construction of said road will sever this exceptor's right of way in such a manner that it will damage the remainder of its said right of way in a large amount, to-wit: The sum of twelve thousand dollars; and that said city commissioners did not, nor did said common council assess any amount in favor of this exceptor or any one else on account of said damages to the remainder of its said right of way."

The defendant in error's demurrer to this exception was sustained and the theory of the court as to the measure of its damages thereby declared. The case was tried upon the theory thus indicated, as fully appears from the instructions given and refused, which related to the subject of damages. These instructions present the issue clearly. Those given by the court and numbered eight to twelve, inclusive, announce the law as declared by the court and limited the jury in assessing damages to three subjects.

First. The value of any land actually taken.

Second. The value of any embankment necessarily taken.

Third. The cost of the removal of such embankment. It was the theory of the court that the plaintiff in error could be required to remove the embankment and that it might have compensation therefor and this added to the value of the embankment removed and of the land taken was the measure of its damages. The jury was distinctly told that the plaintiff in error would be required to reconstruct its railroad at the point where the embankment was removed at its own expense and that the cost of such reconstruction could not be considered in determining its damages.

The instruction asked by plaintiff in error and refused clearly presented the theory that it was entitled to the value of the property appropriated, estimated with reference to the use to which it had been adapted and to which it was devoted. It was shown that the property taken by the proceedings of defendant in error answered a necessary purpose for plaintiff in error even better than anything that could be substituted for it.

It appeared beyond dispute that the destruction of the embankment by the opening of the street would require as a necessary and proximate result that some structure be substituted for the embankment destroyed in order to carry the track across the proposed street and prevent the railroad being severed in twain and its usefulness practically destroyed. The contention of the plaintiff in error maintained here as to the measure of its damages was embodied in its series of instructions numbered from two to nine, both inclusive, but each of these instructions was refused by the court and a several exception reserved. The principal issue to be debated is thus sharply defined.

The general rule for assessing damages where property is taken for a public purpose is so well understood that we need not discuss decided cases. This rule is that an owner whose property is so taken is entitled to compensation for what is actually taken and also for incidental damages to remaining property by such taking. We maintain that this rule is applicable in its full vigor to the case in hand. As we understand the theory of the trial court, the right to compensation for property taken was conceded, although the assessment of the jury, even under the instructions of the court, was smaller than the evidence required. We

insist, however, that the rules announced in the instructions asked and refused should have been applied to the case, and what is in fact the principal injury to this owner's property considered in determining its damages. The evidence introduced by plaintiff in error consisting of testimony as to the value of its property taken for the purpose to which it was adapted and devoted included, as the witnesses stated, estimates of the cost of a suitable structure to take the place of the embankment removed. Under the instructions given by the court the jury were required to disregard all the evidence upon this subject and to accept only evidence relating to such injury as would happen to plaintiff in error up to the time its embankment was destroyed and its railroad severed.

The case upon final analysis reduces itself to a question of whether the police power can be so applied as to require the railroad company to build this bridge without compensation. The only reason for opening Grand avenue is that it will slightly add to the convenience of the people of Connersville. There is now a crossing one square east and another one square west of the proposed crossing. There is no attempt to in any way impede the development of the City of Connersville. The right of the city to open Grand avenue is in no way denied but it is contended that if the city desires further crossings, it should pay the expense of them. The crossing will be of no benefit to the railroad company and will in no way increase anybody's safety, or improve their health or morals. The question presented is "can the City of Connersville require the construction of such a crossing practically entirely at the expense of the railroad company.

It is well established that the issue so raised presents a question under the fourteenth amendment to the constitution of the United States. That amendment forbids the taking of a person's property without due process of law. In determining what is due process of law this court has established the doctrine that compensation for property taken is essential to due process. *Chicago, etc., v. Chicago*, 166 U. S. 226. It therefore follows in the case now before the court that if compensation was not awarded, a right existing under the fourteenth amendment was denied.

It expressly appears from the opinion of the Supreme Court of Indiana that the protection of the amendment was specially set up and claimed by the plaintiff in error and it further appears that the right claimed was expressly denied and necessarily denied in order to reach the result declared by that court. It therefore follows that a federal question is duly presented for the consideration of this court.

The precise question thus presented, so far as we can discover, is one that is new in this court and one which must be decided without much help from the authorities. It is at once apparent that the plaintiff in error does not receive compensation for the embankment taken under the decision of the Supreme Court of Indiana. If Grand Avenue is opened through the embankment it will cost the plaintiff in error approximately $12,000 more than it will receive, leaving out of consideration all question of expense of maintainance. Nor do we understand that any one claims that the railway company will receive compensation. It is contended that the fourteenth amendment

does not extend to this case because of the intervention of the police power. It is contended that the railway company is forced to build this bridge, not because its embankment is taken, but because a state statute requires the railroad company to restore the highway thus intersected to its former state or in a sufficient manner not to unnecessarily impair its usefulness. It therefore becomes necessary to inquire whether the police power in any way compels the building of the bridge here in question. The plaintiff in error insists that the police power has nothing whatever to do with it and that for several reasons.

In the first place, if the railway is to derive any benefit from its remaining property it must build this bridge in order to run its trains, and this must be done regardless of what any statute says. If every statute in the state applying to railroad crossings was repealed, the railway company would be just as much bound to build the bridge as it is now. If the statutes were repealed it would be no more possible to run trains without the bridge than it is now. How, then, can it be claimed that the statute is the thing that makes the expense necessary? The case is entirely different from those in which a railroad is called upon to build gates or cattle guards at a newly constructed crossing. In such cases trains can be run without safety gates or cattle guards and if there was no statute on the subject it would never be absolutely necessary to build such gates or cattle guards in order to run trains. Such things are desirable and are made necessary by the statute, but no statute has anything to do with the building of the bridge here involved.

In the second place, suppose the railroad should refuse

to build the bridge, no criminal prosecution could be brought. The highway would be in perfect order and better for use without the bridge than with it. Of course when a railroad refuses to build safety gates, prosecutions can be brought, but we conceive that no indictment could be framed for refusing to build a bridge for the exclusive use of the railroad company. If the railroad company should prefer to entirely remove its embankment and construct the ordinary grade crossing we know of no statute that would be violated. Grade crossings are allowed in Indiana. *State ex rel. v. Indianapolis Union Railway Company*, 160 Ind. 45. Before it can be said a statute compels an act, there must be some penalty that can be inflicted if the act is not done.

In the third place, there is no evidence or finding that any question of danger ever was in any way considered in these proceedings. The overhead crossing in this place is made necessary by the physical circumstances and not by any consideration of danger. No other kind of crossing can be constructed without reconstructing a very considerable portion of the road. The cases on which the Supreme Court of Indiana relies, in which a railway has been compelled to build an overhead crossing, are cases in which there was first an adjudication that an existing crossing was dangerous. In this case there is no existing dangerous crossing. The essential element upon which the cases relied upon are founded is here entirely lacking. The highway will be safer before the bridge is constructed than afterwards, because so long as there is no bridge there can be no passing trains, and no danger from falling objects or frightened horses.

In the fourth place, this is not a case in which there are any facts that would justify any application of the police power. There is no danger in the existing situation. The change that is being sought is not a change to promote the public safety. The Supreme Court of Indiana does not seem to rely on any ground for the exercise of the police power except the right to look out for the public safety. The danger to which the Supreme Court refers, and apparently the only one upon which it relies, is the danger that exists at grade crossings. It is submitted that the dangers that exist at grade crossings have nothing whatever to do with this case. There is not now a grade crossing. It is not proposed to construct a grade crossing. The physical surroundings are such that it would be very difficult and expensive, indeed, practically impossible, to build a grade crossing. No one would recommend a grade crossing in this situation even if the element of danger at such crossing was left out of consideration. Up to the time the Supreme Court of Indiana delivered its opinion, the question of the danger existing at grade crossings had nothing to do with this case and it is submitted that, so far as logic is concerned, it still has nothing to do with it. The case is one where the City of Conersville is proposing to take away the property of the railroad company used to support its track, and before trains can be run some substitute for the property taken must be provided. The question of danger to the public has no logical connection whatever with any question involved in this case.

In the fifth place, the form of the action indicates that the city is not proceeding in the exercise of its police

power to compel the removal of a danger. The proceeding is one in eminent domain to condemn property. The Supreme Court of Indiana itself has stated this distinction very clearly in the case of *Baltimore, etc., v. State ex rel.*, 159 Ind. 510. In that case a railway was constructed on a high embankment. Later a highway was constructed across the railroad by building sloping approaches that brought the highway to the level of the railway. Still later the railway raised its tracks and constructed the slopes so steep that the highway could not be used. A proceeding in mandamus was brought to compel the railway to reconstruct the crossing so as to make the highway available. The railway offered to prove that it would cost $3,000 and asked that amount in damages. The Supreme Court, on page 521, said that no such claim could be allowed because such claim for damages was a matter which might have been presented for consideration and allowance when the highway was established. The Supreme Court thus distinguishes the two kinds of proceedings. A railway can be compelled, under the police power, to repair or safeguard an existing crossing without compensation, but in a proceeding to create the crossing, the railroad is entitltd to damages by way of compensation for expenses arising from the establishment of the crossing. The questions presented by the two kinds of proceedings are essentially different. The Supreme Court of Indiana, in the case cited, in effect said that a railway can be required to fix a defective crossing without compensation because the railway had its chance to get compensation when the highway was established. In the case now before this court the Supreme Courtof Indiana

has said, in a proceeding to open the highway, that the railway can have no compensation because after the highway is once opened the railway must take care of the crossing without compensation. Such reasoning in a circle is plainly vicious. This proceeding is not in form or substance in any way connected with the police power of the state, but is simply a proceeding in eminent domain for the taking of property, and the railway is entitled to full compensation for the structures destroyed.

In the sixth place, the Supreme Court of Indiana in effect admits that in such a case as this, it is not any state statute that compels the building of the new structure. We cited in that court cases from other states where, under similar circumstances, the railway was allowed full compensation. The court, in an effort to distinguish these cases, used the following language: "The adjudications cited and relied upon by counsel for appellant cannot be accepted as supporting their view of the law. So far as we have observed, in every state referred to except New Jersey, where there appears to be no lgislation on this subjct, the cases cited rest upon local statutes which, in requiring railroad companies to construct and restore highway crossings, have been construed to expressly or impliedly refer to such highways as were constructed before the crossing rialroad." What higher proof could there be that it is not the state statute that compels the new structure? If a railroad is allowed compensation for such structures in a state where no statute requires them it must be because they are structures required by the physical situation and structures which must be provided regardless of any exercise of the police power. If the rail-

road has to build the structure anyhow, it is not a thing which is required by the exercise of the police power. We have not investigated to discover whether the alleged fact relied upon by the Supreme Court of Indiana as distinguishing the cases, is true or not, for the reason that we believe it wholly immaterial even if true. If it is true it only furnishes additional evidence, if more was needed, that the bridge here involved has to be built regardless of any state statute.

In the seventh place, we think the Supreme Court of Indiana wholly misconstrues the statute on which it relies. That statute in terms gives a railroad the right to cross a highway and requires that in case the highway is crossed the rairoad must restore the highway. The statute looks entirely to the interest of the public who use the highway. The statute says nothing whatever about the way the part of the crossing for the exclusive use of the railway is to be constructed. Nor does it require the railroad under any circumstances to cross any highway. In the case now before the court, if the crossing was completely built with the exception of the railway bridge, the highway would be perfectly available and the statue fully satisfied. This question is not open in its full scope in this court but if the construction of the state statute adopted by the state Supreme Court makes that statute violate the constitution of the United States, then this court is not bound by that construction. The Indiana Supreme Court has adopted the view that this statute requires this plaintiff in error to build the bridge in question without compensation. Such a construction violates the fourteenth amendment to the United States Constitution. We know of no

legal theory that would justify any such statute. We perceive no principle upon which a railway can be required to cross a highway at any particular point. The statute so construed would require an expenditure of $12,000 for no purpose whatever in which the state has an interest. The construction is in this instance applied to the main line where the railroad can not well do anything but build the bridge, yet it is quite conceivable that some other route for its trains could be provided. If the construction adopted is correct, it would apply to a switch designed for the exclusive use of the railroad company as well as to the main line. This would mean that the statute would require the building of such a bridge even on a switch which the railroad company would much prefer to abandon. If the construction in question were applied to such a switch, the conflict with the Federal Constitution would be plain. The public would have no interest in any such switch. Nor is the principle in any way different as applied to the main line. The public perhaps can insist that trains be run and that the railroad perform certain duties, but there is no public interest that would justify a statute requiring this railway to cross this highway at the particular spot.

If the construction adopted is to be held correct, it will be possible for a city, by a slightly circuitous process, to completely evade the United States Constitution and take practically any structure without making compensation. For instance, a city could decide to open a street through a tall building. The first step would be to pass an ordinance, if one did not already exist, requiring that whenever the walls of the first story of a

building are removed, the owner must provide sufficient support for it at his own expense, however large. Such an ordinance would in appearance be designed to promote the safety of the public. The next step would be to open a street and condemn and offer to pay for the bricks in the walls of the first story, and if the owner asked pay for his whole building tell him that his first story only was condemned and that the city could remove it, while he was bound under a police regulation to support his building, and hence was not entitled to further compensation. Such a proceeding would, of course, be outrageous, as the city for its own purposes would first create the very condition to which the police regulation, directed against imaginary danger, became applicable. But under the decision of the Supreme Court of Indiana in this case there could be no possible legal objection to it.

The trouble comes from treating as a proper exercise of police power a thing with which the police power has no legitimate connection. The police power may properly be exercised to protect the public from danger, but where the physical facts are such that no possible danger can arise, there is no ground for interference by the police power. In the case now before the court it can not be contended for a moment that the railroad will run trains across this crossing when the bridge is out. The statute, as it has been construed by the court, simply forbids the performance of a physical impossibility. It guards against a danger that is wholly imaginary. Of course, such a statute is ordanarily simply waste paper and can affect no one, but when a city undertakes to apply such a statute in an eminent domain proceeding as an excuse for not

making compensation, the protection of the United States Constitution should not be denied. Such a statute is not used as a legitimate police measure and should not be made a cloak to cover the taking of property without compensation. A statute that can never have any application as a direct regulation of conduct is not a legitimate police regulation, and a pretended police regulation that can never have any application except in eminent domain proceedings is not a legitimate exercise of the police power. The construction adopted by the Supreme Court of Indiana makes this such a statute in so far as it applies to such facts as are here involved. There can be no danger from crossing accidents so long as trains do not run and after the embankment is destroyed, no trains can run until the bridge is built. The statute so applied has no tendency whatever to remove any danger and can only become important in an eminent domain case. In other words, it is in substance, though not in form, an eminent domain statue that provides for the taking of property without compensation. A construction of a statute which produces that result is a construction that places it in conflict with the constitution of the United States. The substance of the matter is to be considered rather than its form, and when this is done it appears that the Supreme Court of Indiana not only misconstrued the language of the statute, but also adopted a construction that makes the statute as applied to this kind of a case unconstitutional. It follows, therefore, that this court should correct that construction.

It thus appears that for many reasons the position assumed by the Supreme Court of Indiana will not bear

analysis. The logic applied is faulty in many particulars, and when the plain facts of the case are considered, it is apparent that this is simply a condemnation proceeding brought under the power of eminent domain in which the police power has no proper place.

A brief discussion of the authorities would perhaps be of some assistance to the court. The only case from this court at all closely in point which we have found is *Chicago, etc., Co. v. Chicago*, 166 U. S. 226. In that case the city of Chicago, by an eminent domain proceeding, opened a street across a railway track of the C. B. & Q. R. R. The question was whether the railroad was entitled to recover as compensation the cost of crossing gates and other crossing protection that would be rendered necessary by the new crossing. It was held by a divided court that the railroad was not entitled to compensation on the theory that the crossing could be completed without gates or other protection and that the police regulations in the interest of public safety would then apply and make it necessary to build the gates. This case appears to go about to the limit in eliminating items for which compensation must be made. The dissenting opinion is very vigorous and some state courts have adopted the view of the dissenting Justice. Whether this case was rightly decided or not, the reasoning on which it rests does not extend to the present case. The case now before the court is one in which it is not mechanically possible to complete the crossing without building the bridge. The bridge must be built before it can be said there is any railroad crossing in existence to which state statutes can apply. Until the bridge is built there is no railroad crossing. It

is the necessity to replace a part of the railroad structure that has been taken, that makes it necessary to build the bridge, and not any state statute applicable to the situation. In the case cited, no part of the railroad structure essential to its operation was taken. If state statutes had been repealed, the road could have been operated without safety gates. The police power of the state had been exercised and gates had been required. Moreover, the state statutes requiring safety gates were valid police regulations directed against a real danger and not merely statutes that could never have any application except in eminent domain cases. In the case now before the court there is no valid state statute that requires the building of the bridge. When the plain facts in this case are considered, there is no question of danger in it. There is no occasion for invoking the police power and nothing that would justify its application. Much of what is said in the Chicago case as to the manner in which damages should be estimated is very much in point but the discussion as to safety gates does not in any way justify the result reached by the Supreme Court of Indiana in this case.

The case of *Chicago, etc., v. People ex rel. Drainage Commissioners*, 200 U. S. 561, is at first glance somewhat like this in that a railroad company was required to enlarge its bridge over a natural water course. Upon analysis, however, the cases will be found to be entirely unlike. In that case the public had the right to cross the railroad track with a natural watercourse and the only question was as to the size of the watercourse the public was entitled to maintain. It was held that the railroad had invaded the public right and must remove obstructions.

In the case now before the court the city has no right of any kind to cross the railroad except as it acquires such right by purchase through condemnation proceedings. The question here is not the extent of an existing right, but the value of property taken in acquiring a right.

There are also several cases, of which *Northern, etc., Co. v. Minnesota*, 208 U. S. 583 is a type, in which it has been held that a railroad can be required to repair an existing viaduct. Such cases, however, are fundamentally different from the case here presented because in those cases the crossing was already in existence and was becoming dangerous from lack of repair. A crossing danger was actually in existence and the public had the right to cross. There was no question involved as to the taking of property from the railroad. Those cases serve to define the rights which a city acquires when a crossing is established, but none of them discuss at all the question of what the city should pay at the time the crossing is established, which is essentially a different question. When a crossing is once established, a city has many rights it had not before. In other words, the city receives something in return for the money it pays in condemnation proceedings. Such cases as the one cited we believe to be so remotely connected with the case now before the court that a prolonged discussion of them would not be profitable.

There are, of course, a multitude of cases dealing with the police power in general, but we known of no others from this court at all closely in point on the question of whether any police regulation can require the building of the bridge involved in this case without compensation.

The authorities in Indiana on this subject are also not numerous. The case most relied on by the Supreme Court of Indiana appears to be *Lake Erie, etc., v. Shelley*, 163 Ind. 36. That is a case which deals entirely with crossing protection and simply follows *Chicago, etc., v. Chicago*, 166 U. S. 226, and is not in point for the same reasons that were pointed out in connection with that case.

Another type of case apparently relied upon by the Indiana Supreme Court is *Railway Company v. McCarrell*, 163 Ind. 469. It was held in that case with reference to a crossing long established that the railway company was under a continuing duty to keep the crossing in repair. Such a case as that has nothing to do with the present. After the bridge here involved is once built, it will become the duty of the railway to keep it in repair the same as any other portion of its right of way. It is not contended in the present suit that the city incurs any obligation to build the bridge or keep it in repair. The city's obligation ends when it pays the money sufficient to constitute compensation for the land taken when its particular use and value is considered. The question is, what should the city pay to acquire the right to destroy a part of the foundation of the railway track and open the street and not what obligations will arise after the street is once opened.

The case of *Chicago, etc., v. State*, 158 Ind. 189, also relied upon by the Indiana Supreme Court, is less in point. In that case the highway was constructed first and later the railroad was laid across it. There was no question involved as to a taking of part of the right of way by the

public. The case of *Chicago, etc., v. Zimmerman,* 158 Ind. 189, is of the same type.

Another type of cases relied upon by the Indiana Supreme Court is represented by *Vandalia, etc., v. State ex rel.*, 166 Ind. 219. In that case the public had acquired a complete right to cross and the question involved was entirely the obligation of a railroad to fix an existing crossing. No question was involved as to the compensations to be made when the public first acquired the right to cross. The difference between the two classes of cases was very clearly pointed out in *Baltimore, etc., v. State,* 159 Ind. 510, heretofore discussed, which is a case of the same type. This class of cases shed practically no light on the question now before the court. The case of *Railway Co. v. State*, 159 Ind. 237, relied upon by the Supreme Court of Indiana, is also of this type.

These are the only cases cited from Indiana by the Indiana Supreme Court. None of them lend any support to the contention that the police power has anything to do with this case. The dictum occurring in *Baltimore, etc., v. State ex rel.*, 159 Ind. 510, at page 521, comes the nearest being in point and it is directly opposed to the opinion written in this case. So far as we can discover, there is no authority in Indiana or elsewhere that supports the result reached in this case.

When the authorities from other states are considered, the case found which seems to us most nearly in point is *Cincinnati, etc., v. City*, 68 Ohio St. 510. The physical facts in that case are practically the same as in this case. The court held that the railroad company was entitled to recover the full value of the bridge. The court in that

case allowed recovery because the opening of the street made necessary a structural change in the railroad. This would appear to be but another way of saying that the building of the bridge was a matter of physical necessity and not legal necessity. It is true in that case, the court held that no state statute as to constructing a crossing, applied, but for reasons heretofore discussed we do not believe that point material. The point made by the court was that they were dealing with a change in the railroad structure and for such a change the railroad was entitled to full compensation. The change related to construction and not to operation and slight adjustments incident thereto. The railroad was required to replace property actually taken.

The distinction between a mere regulation affecting the operation of a railroad and an important structural change made necessary by a new highway crossing a railroad, is well illustrated in *Morris, etc., Ry. Co. v. City of Orange*, (N. J.) 43 Atl. 730.

A railroad company had constructed a switch for the storing of cars. The switch was lower than the main track. The city extended a street across the main track and also the switch. The extension required the railroad company to raise the grade of the switch in order that it could be used. It was held in accordance with many authorities that the company could be required to plank the crossing, maintain a flagman, or gates if necessary, or to pay the expense of signs, as these were all expenses incident to operation. It was held that the city must pay the expense that would be occasioned by adjusting the grade of the switch to conform to that of the street. This

was plaintly upon the ground that such a change was not merely an incident to the operation of the road but was a structural change required by the changed condition, and that the expense of such construction could not be imposed upon the company. Among other things, the court said:

"That for an injury occasioned by necessary structural changes such as the removal of buildings or changes in the tracks, compensation should be made which would be adequate under the circumstances."

Speaking of the extent to which the cases have gone in requiring railroad companies to adapt their tracks to new conditions without compensation and adopting the view expressed by the cases least favorable to railroad companies, the court said:

"In some of the cases the cost of planking between the rails and the expense of maintaining it have been allowed as for structural changes in the company's property to make it conform to the new use. In the greater number of cases compensation of this character is disallowed on the ground that such an adaptation of the company's property to the passage of the public highway is not a structural change but a provision for the safe passage of the public using the highway over the company's tracks for the benefit of the public on the one hand and the protection of the tracks on the other hand."

The New Jersey court adopts the doctrine of what it describes as the greater number of cases and the reason upon which they rest is stated in the above quotation; but declines to apply the rule to the elevation of the switch involved in the case before it. As indicated in the quotation just made, there are a number of cases in which it has been held that the railroad company should have compensation where the opening of a street or highway involves

the construction and maintenance of gates, signs, or cattle guards or the employment of flagmen.

Village, etc., v. Pere Marquette, etc., Co., (Mich.), 102 N. W. 947;

In re Opening, etc., (Mich.), 26 N. W. 159;

Commissioners v. Michigan, etc., Co., (Mich.), 51 N. W. 934;

Commissioners v. Canada, etc., Co., (Mich.), 51 N. W. 447, and cases cited therein.

In the case in hand no such question as was decided in those last cited appears, and it is probably true as stated by the New Jersey court that the weight of authority is against allowing railroad companies damages on account of such things as have just been mentioned. They are classed as incidental expenses of operation to be incurred for the safety of the trains, employes and passengers of the railroad company as well as that of persons crossing the tracks upon the highway. In other words they come fairly within many definitions of the police power, which certainly extends to the public safety.

If it be assumed that those who construct railroads must be held to do so in anticipation that the increase of population and general development of the country will make new highways and additional safeguards necessary from time to time and that changes thus rendered necessary to protect both the public and the railroad company must be made without compensation, then the conclusion reached in the cases referred to by the New Jersey court as constituting a majority follows naturally enough. We maintain, however, that as is pointed out in the cases from which we have quoted as well as many others that the reasoning

forbidding railroad companies compensation for the construction of cattle guards, signs, safety gates and the like, wholly fails when such a case as is here presented arises. The opening of a street as is here proposed destroys a valuable structure essential to the railroad company, that was built by it and is as much its property as any depot or freight house that it owns.

If such a structure can be destroyed and the railroad company compelled to build something else in its place without compensation, we perceive no reason why a highway may not be opened through any of its depot buildings or freight houses in like manner and without compensation.

What is involved here is not merely a slight change required for the safety of the public and the railroad company as well, but the destruction of a permanent and expensive structure owned by the railroad company that can be replaced by nothing as suitable for its purposes, in a situation where the public safety is not a consideration at all. So far as the public is concerned the railroad company can operate its trains just as safely upon the embankment that is to be destroyed, as it can possibly do upon any bridge that can be constructed. If, then, it is required to construct a bridge without compensation, it is plain that it will be compelled to expend a large sum of money in making an important structural change in its property in a case where the public safety will be in no way enhanced after the change has been made.

Upon familiar principles of universal application a railroad company should be allowed damages sufficient in amount to cover the value of the property taken for the

purpose to which it was devoted and to which it had been adapted by the expenditure of a large sum of money. This rule has been recognized in Indiana with respect to real estate so situated as to be adapted to platting and sale in small lots.

Ohio Valley, etc., Co. v. Keith, 130 Ind. 314.

The same rule was vigorously announced in *Robb v. Maysville, etc., Co.*, 60 Ky. 117.

The Kentucky court declared that the measure of damages where land was taken was the value of the property to the owner considering his interest in other land in the vicinity and the use to which the land taken was applied or for which it was suitable. That court held that the test was to inquire what would the land taken be worth to one who owned the adjacent land, and was in the situation of the owner in all respects except that he did not own what was taken. Nothing short of this, it was said, could secure "just compensation" within the meaning of the constitution of Kentucky.

The rule is here well stated and it is plain that to this railroad company owning the tracks on either side of the opening of Grand avenue the embankment upon which its track rests there is worth to it at least what it would cost to put something in its place. That is to say, one buying the railroad property with the embankment could readily afford to include in the price as much as the best steel bridge with its abutments would cost, rather than take the property without the embankment and be at the expense of constructing and maintaining a bridge.

Indeed, the evidence showed that no bridge could be constructed and maintained at the point in question that

would answer the railroad company's purpose as well and be as cheaply maintained as the old embankment that has been pounded and solidified by fifty years of passing trains.

The same rule as to what constitutes adequate compensation was applied in *Chicago, etc., v. Jacobs*, 116 Ill. 414, where land had a special value for market gardening.

In *Lake Shore, etc., Co. v. Chicago, etc., Co.*, 100 Ill. 21, it was held that where a railroad property had no market value and was of no use for any purpose except the one to which it was devoted, then its value for such purpose could be proved by a competent person and that the company having its property taken, by another crossing its right of way, should be fully compensated upon the basis named.

In *Price v. St. Paul, etc., Co.*, 27 Wis. 98, the same rule as to determining adequate compensation was applied where certain property had been adapted for use as a water cure by the construction of certain fixtures and appliances. The court held that the impairment of its value for the particular use to which it was devoted should be recovered.

In discussing such a question as we have here, the Supreme Court of Illinois in *Lake Shore, etc., Co. v. Chicago, etc., Co.*, 100 Ill., at page 31, says, after citing certain cases:

"Upon the principle of these decisions there was surely error here in the ruling of the court, unless there is to be a different rule applied to corporations seeking such condemnation as this, than to individuals, which there is not. As we have heretofore said, they stand upon the same footing in this respect."

Authorities are cited in support of the declaration, and

it is repeated in *Chicago, etc., Co. v. Englewood, etc., Co.*, 115 Ill., at page 384.

Necessarily under our constitution and decisions the same rules apply to both natural and artificial persons and where the property of a corporation is taken, its compensation is to be measured precisely as in the case of an individual. All statutes providing for the condemnation of property for a public or quasi public use must be so interpreted and applied in cases that actually arise as to secure such compensation. If not constitutional guaranties are destroyed and statutes prescribing the method for condemning property are invalid if so interpreted as to permit such a result.

This has been declared in many cases, a few of which we have cited. Among these the case of *Chicago, etc., Co. v. Springfield, etc., Co.*, 67 Ill. 142, decided in 1873, has become a somewhat leading case. The case was one where one railroad company appropriated a right of way through an embankment supporting the track of another railroad company and the question considered on appeal was the measure of damages. The railroad company that owned the embankment was denied compensation, based upon the cost of a structure to take its place in supporting its track, apparently upon the suggestion that the condemning company expected to construct and maintain a bridge over its track at the point in question upon which the tracks of the other company could be laid.

The Supreme Court was of opinion that the condemning company could not be required to do this whatever its present expectation might have been, but that the burden of constructing and maintaining such a bridge would fall

upon the company that owned the embankment which the bridge was to replace. Having so declared, the court said:

"It would be a presumption of law that the appellants received by means of the judgment and award of damages, not only just compensation for the land taken, but for all such incidental loss, inconvenience and damages which might reasonably be expected to result from the construction and use of this crossing in a legal and proper manner. This is the true measure of just compensation contemplated by section 13 of the Bill of Rights, as respects natural persons, and the 14th section of Article 11 of the constitution places corporations upon the same footing.

* * * * * * * * *

"In this view, the amount of compensation should not be based or be made upon the assumption that appellee will construct a sufficient bridge and support, and keep the same in repair, because neither appellee nor its contractor is legally bound to do any such things, and their expectations in that behalf form no proper ingredient of the estimate under the circumstances of this case.

"Appellants are entitled to such sum for damages, to be paid by appellee in money, as will enable appellants to construct and keep in repair all such works as may be necessary to keep their track in a safe and secure condition. Nothing short of this can amount to the 'just compensation' provided by law."

In the case now in hand there is not the slightest suggestion that the appellee has even an expectation of substituting a bridge or any other structure for the embankment that it proposes to destroy.

The same case was before the Supreme Court of Illinois seven years later under the title of *St. Louis, etc., Co. v. Springfield, etc., Co.*, 96 Ill. 274. The damages assesed had been substantially increased upon a second trial but the company owning the embankment had again appealed and the case was reversed because of an instruction authorizing the jury to assess damages for an inferior construc-

tion to take the place of the embankment. The court held that the following instruction should have been given:

"The jury are instructed that in a proceeding for condemnation such as this, it is the duty of the petitioner, seeking to condemn a right of way through the defendant's embankment, to pay the defendants a sufficient sum of money to enable the defendants to place their track over the point condemned in as safe a condition, as nearly as the nature of the case will permit, as it was before the excavation was made."

The court mentioned the fact that no bridge would be as safe as the original embankment and added:

"All loss which may be sustained at this point, in consequence of having the bridge instead of an embankment, is chargeable to appellee. The excavation is solely for its benefit, and it cannot charge upon another any expense or loss arising therefrom.

"If any other kind of a bridge is more safe, appellant is entitled to have a sum sufficient to erect and maintain, perpetually, a bridge of that degree of safety."

In *King v. Minneapolis, etc., Co.*, 32 Minn. 224, the same rule was applied to property having a particular value as a site for manufacturing plows.

In *Terre Haute, etc., Co. v. Crawford*, 100 Ind. 550, it was held that the owner of a tract of land could recover damages for the expense of filling or raising it from two to five feet where such filling was made necessary by the construction of a railroad. It was also held that the opinion of a non-expert witness as to the cost of making such a fill was competent evidence. Here the land owner was plainly allowed for making a change that might be called a structural change, occasioned by the construction of a railroad. If a railroad company is accorded the same right when its property is taken by a municipal corporation under the power of eminent domain, it seems clear

that the appellant here should be allowed the reasonable expense for substituting something approximately as good, for its purpose, in place of what is taken from it.

But as fully shown by adjudicated cases the distinction between those most favorable to the position that the defendant in error must here maintain, and the one now presented for decision is very plain. We are not concerned here with the construction or maintainance of a highway crossing at all. It is not proposed that appellant shall provide planking, gates, signs, flagmen, or any of the things required at crossings to which the statutes refer.

The question here is as to the destruction of appellant's property consisting of a valuable and permanent structure costing a large sum to construct and requiring years to make highly efficient and the construction of a new and costly structure to take its place in order to carry appellant's railroad far above a proposed highway, and which when constructed, will leave the railroad just where it is, and where the operation of it will have no different relation to the safety of persons on the highway or to the safety of its trains and passengers on account of the highway than it had to those matters at the same point before any highway was opened. The subjects of the public safety and the operation of the railroad at the point in question are in no way affected by the proposed opening of the highway and the construction of the necessary bridge to carry the railroad track. There is, therefore, no basis whatever for taking appellant's property without compensation under the guise of an exercise of the police power of the state. The whole foundation of the doctrine upon

which defendant in error must rely is wanting when applied to the facts here presented and the effort to deprive plaintiff in error of its property without "just compensation" does not obtain sufficient color by invoking the somewhat nebulous police power to conceal its true character.

If this railroad embankment instead of being used by a railroad engaged as a common carrier had been used in precisely the same way to connect the different parts of a factory or a factory with its storage yard no one would have thought of making the contention that the police power was in any way involved or that the state had the power to pass any police regulation that would compel the building of the necessary bridge without compensation.

The contention when made by the plaintiff in error is just as meritorious as it would be if made by a factory or private citizen. No confusion of ideas should result from the fact that a railroad is involved. There are of course many dangers peculiar to railroad operation but none of those dangers are here involved. The case presents the simple situation of the taking of an embankment which must be replaced by a bridge if work is to go on. Property taken most be replaced. There is no question of danger involved and no state has power to pass any statute no matter what it's form, which would result in the taking of this embankment without paying for the substitute that must be provided.

We submit with confidence that the Supreme Court of Indiana proceeded on an erroneous theory and reached a result that deprives the plaintiff in error of rights guar-

anteed by the fourteenth amendment to the constitution of the United States. Such a judgment should be in all things reversed.

Respectfully submitted,

JOHN B. ELAM,
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REUBEN CONNER,
Attorneys for Plaintiff in Error.

—IN—

The Supreme Court of the United States

October Term, 1909.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA

CINCINNATI, INDIANAPOLIS AND WESTERN RAILWAY COMPANY,
Plaintiff in Error,
vs.
CITY OF CONNERSVILLE,
Defendant in Error.
No. 190.

21246.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

While the statement of the nature of the case and of the record made by the plaintiff in error is substantially correct, the defendant in error believes that the following additional statement of the case may be of some aid to the court.

In accordance with the rules of the Supreme Court of Indiana, a statement of the case was made in the briefs of the parties filed in said court and the following addition to the statement made in appellant's brief was made in the appellee's brief in said court.

"As the right to open up the street in question is conceded and the only matter in controversy is the amount of damages, it is probably unnecessary to do so, yet it is fair to say that the

street known as Grand avenue is the longest street in the City of Connersville, extending almost the entire length of the city from north to south, and that appellant's embankment and track run across said city from east to west, leaving about two-thirds of the platted territory and one-half of the population on the north of appellant's track; that most of the commercial business is on the south and most of the manufacturing on the north of said track. * * *

The old canal runs through the city from north to south and the Big Four railroad parallels the canal, both of which pass under appellant's road at Western avenue, and the only crossings of appellant's road in said city are at Eastern, Western and Central avenues, and a dangerous grade crossing at Lincoln avenue. The Eastern crossing is across a net work of side tracks; Central is so close that there is much switching across it, and at Western it is close to the Big Four and consequently dangerous, thus leaving no good and safe crossing such as will be provided by opening up Grand avenue."

ARGUMENT.

The defendant in error submits:

1. That no federal question is involved and hence this court has no jurisdiction to reverse the judgment of the Supreme Court of Indiana.

When the laws operate upon all alike, and do not subject an individual to an arbitrary exercise of the powers of government, due process of law and the equal protection of the laws are secured.

Duncan v. Missouri, 152 U. S. 377;
Field v. Barber Asphalt Co., 194 U. S. 618.

When persons have the benefit of a full and fair trial in the several courts of their own states, where their rights are measured by general provisions of law, applicable to all in like condition, and as a result are deprived of their property, it cannot be said that such deprivation is without due process of law.

Marchant v. Pennsylvania Co., 153 U. S. 380.

If persons have an opportunity to appear before a court or tribunal and contest proceedings which lay a tax or assessment on their property, or appropriate such property, such proceedings are due process of law.

Davidson v. New Orleans, 96 U. S. 97;
Lent v. Tillson, 140 U. S. 316;
Palmer v. McMahan, 133 U. S. 660;
Huling v. Kaw Valley Ry. Co., 130 U. S. 559;
Kentucky Railroad Tax Cases, 115 U. S. 321;
Fallbrook, etc., Dist. v. Bradley, 164 U. S. 112.

If the highest court of a state renders an erroneous decision upon general principles of law, which affects property, it is not depriving a party of property without due process of law.

Morrow v. Brinkley, 129 U. S. 178;

Lent v. Tillson, 140 U. S. 316.

The provision of the constitution that private property shall not be taken for public use without just compensation applies only to the Federal Government.

Fallbrook Dist. v. Bradley, 164 U. S. 112.

In the case last cited Mr. Justice Peckham, speaking for the court, said, "We should not be justified in holding the act to be in violation of the State Constitution in the face of clear and repeated decisions of the highest court of the state to the contrary, under the pretext that we were deciding principles of general constitutional law.

"If the act violates any provision, expressed or properly implied of the Federal Constitution, it is our duty to so declare it, but if it do not, there is no justification for the federal courts to run counter to the decisions of the highest state courts, upon questions involving the construction of state statutes or constitutions, on any alleged ground that such decisions are in conflict with sound principles of general constitutional law."

It will be observed that the plaintiff in error has pointed out no section of the Statutes of Indiana, the constitutionality of which is seriously questioned.

It certainly cannot be said that every citizen of a state who feels aggrieved by the taking of his property under the power of eminent domain can invoke the jurisdiction of this court to review the decision of the highest court of the state wherein the controversy arose.

In *N. P. R. Co. v. State of Minnesota ex rel. City of Duluth,* 208 U. S. 583, there was great similarity in the questions involved to the case at bar, and in the Minnesota case this court took jurisdiction, but it will be observed that the ground of such jurisdiction was, the claim that the municipal legislation complained of was violative of the obligations of a contract.

It seems to be conceded, and in view of the decided cases it

must be, that the defendant in error could have proceeded by mandate and compelled the plaintiff in error to open up its embankment without compensation for so doing. If this is true, the attack made is on the method of procedure and not because any right of plaintiff in error, which is protected by the constitution, has been taken away. Surely this court is not called upon to determine the appropriate procedure in the several states in enforcing the laws thereof. This is a matter solely under the control of the highest courts of the several states.

If we are right in the foregoing it logically follows that the writ of error or appeal should be dismissed.

2. If this court has jurisdiction in this cause, the defendant in error respectfully submits that there was no error in the judgment of the Supreme Court of Indiana in this cause and that its decision is fully sustained, not only by the decisions of the courts of the several states, but by the decisions of this court.

The judgment on which this writ of error is founded is reported in 170 Ind., at page 316.

Since this judgment was entered the case of *N. Y. C. & St. L. R. Co. v. Rhodes* has been decided by the Supreme Court of Indiana in a well considered opinion reported in 86 N. E., page 840. This is in harmony with the case at bar and the authorities therein cited abundantly sustain the opinion.

In the case last cited it is said "It is clear from our statute and the authorities cited that a railroad company acquires its right of way subject to the right of the state to extend public highways and streets across the same, and subject to the condition that it must place, keep and maintain all highway crossings, regardless of whether the highway was established before or after the road was built, in such condition as not unnecessarily to impair the usefulness of the highway, and 'so as not to interfere with the free use thereof, in such a manner as to afford security for life and property,' without reference

to whether the railroad company owns the right of way in fee or merely an easement therein." Authorities are here cited.

"Having accepted the privileges and franchises from the state and acquired its right of way subject to such right under said statute on the part of the state, it is not entitled to any compensation for the interruption and inconvenience, if any, nor for increased expense nor increased risk, if any, nor for the expense and inconvenience of the railroad company in complying with the requirements of said statute at highway crossings." Numerous cases are cited as sustaining the above. And the opinion proceeds:

"Such subdivision 5, Section 5195, Burns Annotated Statutes 1908, does not depend for its validity upon the police powers of the state, but is valid because the state has the power to provide conditions upon which railroads acquire their right of way in the state, and such conditions are binding whether the right of way be acquired by deed, condemnation or otherwise. Moreover, the laws requiring railroad companies to construct, maintain and keep in safe condition all the highway crossings by the erection and maintenance of gates and men to operate the same, planking the crossing, construction of cattle guards, employment of gatemen or flagmen, etc., or otherwise, are passed in the exercise of the police power and are constitutional although enacted after the railroad was built." Again numerous authorities are cited. The opinion proceeds:

"It is evident, as we have already held, that in proceedings to establish a public highway across a railroad track the railroad company is not entitled to any damages for the cost and expense of complying with the requirements of Section 5195, *supra*, or of the laws passed in the exercise of the police power, and that, when the highway crosses the right of way at a point where the company has only a main track and two switch tracks, no question can justly arise as to the impairment

of its franchise by such taking, if under such circumstances both the use as a highway and as a railway can stand together, and do not interfere with each other." Here again a great number of authorities are cited. It is further said in said opinion: "The use of the right of way by appellant for its tracks was a public use, and the use of the right of way for a highway was also a public use, and each use might be exercised without being an obstruction to the user for that public purpose by the other. The use is a joint use and a different rule for ascertaining a just compensation must be applied than that which obtains in condemnation of land of other land owners. In the latter case the land owner is absolutely deprived of the use of his land and the market value of the land taken, and the damage, if any, to the remainder of said land not taken, are proper elements to be considered. In the case of extending a highway across the right of way of a railroad, the latter is not deprived of its public use of its right of way. Such use by it may continue after the highway is located and opened; the use for the purposes of a highway being subject to the use of the company for railroad purposes."

To the same effect, see *C. B. & Q. R. Co. v. City of Chicago,* 166 U. S. 226. In this case it was held that "A railroad company is not denied the equal protection of the laws by awarding it merely nominal compensation for the laying out of a street across its road, while individual property owners are given the value of their land which is taken.

It is a little difficult to fix the limits of the police power of a state. In 8th Cyc, page 863, it is defined as follows: "Police power is the name given to that inherent sovereignty which it is the right and duty of the government or its agents to exercise whenever public policy in a broad sense demands, for the benefit of society at large, regulations to guard its morals, safety, health, order, or to insure in any respect such economic conditions as an advancing civilization of a highly complex character requires."

In note 6, on same page, the following definition is given: "A power which inheres in the state and in each political division thereof to protect by such restraints and regulations as are reasonable and proper the lives, health and property of its citizens."

It is insisted by the plaintiff in error that the safety of the people is in no way involved in this case, but on page 106 of the record, near the bottom of the page, it is shown that at the Grand avenue crossing there is a path worn there by men going up and down going over the railroad, which path has been there for years. In view of the fact that there are only four places where there are driveways from the northern part of the city to the southern, the Lincoln avenue crossing being a dangerous grade crossing, the Eastern avenue crossing over a net of railway tracks, the Central crossing within the switching limits, and the Western avenue and Milton Pike crossings being close to the Big Four railway tracks, it is plainly evident that the safety of the citizens is involved, but we believe that the convenience of the people and the prosperity of the community are protected by the law and the police power as well as the health and safety of the citizens.

We think the following propositions are well settled law.

(a). Under the statutes of Indiana it is the duty of all railroad companies to construct and keep in safe and good condition all highway crossings, and *this duty is the same whether the highway was established before or after the railroad was built.*

L. E. & W. R. Co. v. Shelley, 163 Ind. 36, and authorities cited;

Evansville, etc., R. Co. v. State ex rel., 158 Ind. 276, 278;

Chicago, etc., R. Co. v. State ex rel., 158 Ind. 189, 191-193;

Chicago, etc., R. Co. v. State ex rel., 159 Ind. 237, 240, 241;

Baltimore, etc., R. Co. v. State ex rel., 159 Ind. 510, 517, 521;

Chicago & N. W. R. Co. v. City of Chicago, 140 Ill. 309;

State v. St. Paul M. & M. R. Co., 108 N. W. 261;

American Digest, 1906 B., page 4614, Sec. 32.

The following statutes of Indiana bear on the questions involved in this cause.

Section 3542, Burns' Revised Statutes of 1901, reads as follows: "That common councils of incorporated cities shall have the power to enforce ordinances to establish the grade for railroad tracks on a level with improved streets or on streets being improved, and provide a penalty for the violation of such ordinance, on the refusal of any railroad company to comply with its provisions."

In Section 5195, Burns' R. S. 1908, it is provided as follows: "Every such corporation shall possess the general powers and be subject to the liabilities and restrictions expressed in the special powers following: 5th. To construct its road upon or across any stream of water, water course, road, highway, railroad or canal, so as not to interfere with the free use of the same, which the route of its road shall intersect, in such manner as to afford security for life and property, but the corporation shall restore the stream or water course, road or highway, thus intersected, to its former state, or in a sufficient manner not to unnecessarily impair its usefulness or injure its franchise."

The following portion of Section 5249, Burns' R. S. 1908, is in point. "Whenever the track of such railroad shall cross a road or highway, such road or highway may be carried under or over the track, as may be most expedient."

Section 5250, Burns' R. S. 1908, reads as follows: "That it shall be the duty of each railroad company whose road or tracks cross, or shall hereafter cross, any street, avenue, or

alley, in any incorporated town or city in the State of Indiana; which said street, avenue or alley has been, or shall hereafter be, by addition, plat or otherwise, dedicated to the public use, to properly grade or plank or gravel its said road and tracks at its intersection with and crossing of said street, avenue or alley in accordance with the grade of said street or avenue, in such manner as to afford security for life and property at said intersection and crossing."

Section 8655, Burns' R. S. 1908, in Clause 49, gives the common council of every city the power to enact ordinances for the following purposes: "To compel persons or corporations owning or operating railroads to construct and maintain bridges, viaducts or tunnels, and approaches thereto, across their respective roads or rights of way at street or alley crossings or other places."

(b). Laws requiring railroad companies to construct, maintain and keep in a safe condition all highway crossings are passed in the exercise of the police power, and are constitutional, although enacted after the railroad was built.

Elliott, Railroads, Sec. 1102;

Portland, etc., R. Co. v. Inhabitants of Deering, 78 Me. 61;

Chicago, etc., Co. v. City of Chicago, 140 Ill. 309, 29 N. E. 1109, and cases cited;

Illinois Cent. R. R. Co. v. Willenborg, 117 Ill. 203;

Chicago, etc., R. Co. v. Chicago, 166 U. S. 226.

(c). The requirement that compensation be made, for private property taken for public use imposes no restriction upon the inherent power of the state by reasonable regulations, to protect the lives and secure the safety of the people.

New York, etc., R. Co. v. Bristol, 151 U. S. 556, 567.

(d). Uncompensated obedience to a regulation enacted for

the public safety under the police power of the state is not a taking or damaging, without just compensation, of private property, or of private property affected with a public interest, and is not violative of property rights protected by the federal constitution.

Mugler v. Kansas, 123 U. S. 623, 668;

Boston, etc., R. Co. v. Commissioners, 79 Me. 386;

Thorpe v. Rutland, etc., R. Co., 62 Am. Sec. 625;

Lake Shore, etc., R. Co. v. Cincinnati, etc., R. Co., 30 Ohio St. 604;

L. E. & W. R. Co. v. Shelley, 163 Ind. 36-46, and cases cited;

Chicago & N. W. R. Co. v. City of Chicago, 140 Ill. 309;

State v. St. Paul M. & M. R. Co., 108 N. W. 261;

American Digest, 1906 B., page 4614, Sec. 32;

N. P. R. Co. v. State ex rel. Duluth, 208 U. S. 583.

(e). The plaintiff in error was entitled to no damages and, therefore, cannot complain of an allowance of $800.

L. E. & W., etc., R. Co. v. Shelley, 163 Ind. 36, 47.

(f). The plaintiff in error could have been compelled by mandate to open up the crossing, the same being a legal duty, and, therefore, would be entitled to no compensation for so doing.

C. I. & L. R. Co. v. State ex rel. Zimmerman, Trustee, 158 Ind. 189, and cases cited;

C. & S. E. R. Co. v. State ex rel., 159 Ind. 237, and cases cited.

N. P. R. Co. v. State ex rel. Duluth, 208 U. S. 583;

C. B. & Q. R. Co. v. City of Chicago, 166 U. S. 226;

Vandalia R. Co. v. State ex rel. South Bend, 166 Ind. 219.

(g). The duty of making the crossing is imposed by statute, but such duty exists independently of the statute.

C., etc., R. Co. v. State ex rel., 159 Ind. 237, 240;

E., etc. R. Co. v. Crist, 116 Ind. 446, 454;

E., etc., R. Co. v. State ex rel., 149 Ind. 276, 278, and cases cited;

C., etc., R. Co. v. State, 158 Ind. 189;

Elliott Railroads, Secs. 1102, 1105.

(h). The legislature may regulate the use of highways by a railroad company by requiring the crossings to be made in a particular manner; and may even impose upon the company the duty of adapting the track and grade to new highways so as to make the crossings safe and convenient. It is the duty of a railroad company to make all public crossings, and such duty cannot be delegated or shifted to another.

Elliott Roads and Streets, Sec. 778.

S. I. R. Co. v. McCarrell, 163 Ind. 469;

Vandalia, etc., Co. v. State ex rel., 166 Ind. 219.

(i). Municipal corporations of the State of Indiana are given exclusive control over their streets and alleys. Such corporation has no power, by contract, ordinance or by law, to cede away, limit or control its legislative or governmental powers, or to disable itself from performing its public duties.

Vandalia Ry. Co. v. State ex rel. City of South Bend, 166 Ind. 219, 231, and cases cited;

New York, etc., R. Co. v. Village of New Rochelle, 60 N. Y. Supp. 904;

Brimmer v. City of Boston, 102 Mass. 19;

Milhau v. Sharp, 27 N. Y. 611; 84 Am. Dec. 314;

City of Oakland v. Carpenter, 13 Cal. 540;

Mott v. Pennsylvania R. Co., 30 Pa. St. 9, 72 Am. Dec. 664;

Mayor, etc., v. Bowman, 39 Miss. 671;

Dingman v. People, 51 Ill. 277;

Matthews v. City of Alexandria, 68 Mo. 115, 30 Am Rep. 776;

N. P. R. Co. v. State ex rel. Duluth, 208 U. S. 583.

The right of the defendant in error to compel the opening up of the street in question is conceded. The only questions contested relate to the method adopted and the amount of damages assessed. We have heretofore suggested that the mode of procedure is under the exclusive control of the state courts.

As to the damages assessed, the defendant in error contends that the plaintiff in error was entitled to no damages, as it was bound to make and maintain a suitable crossing without compensation.

We shall not attempt to review the cases cited by plaintiff in error in its able brief, nor to reconcile them with what we conceive to be the law applicable to this case, as set forth in our propositions and authorities cited, but it may not be amiss to suggest that as the day of miracles is past, an attempt to reconcile the conflicting decisions might be hopeless.

One of the leading cases cited by appellant, that of *C., etc., Co. v. Springfield, etc., Co.,* 67 Ill. 142, we think is easily distinguishable from the case at bar in this, that the case cited involved a conflict between two railroad companies as to which should be at the expense of providing the crossing, and we think it was rightly held that the railway which was first constructed being prior in point of time was prior in right, and that, therefore, the expense of constructing the crossing devolved upon the company, the constructing of whose road made such crossing necessary.

In the case cited the parties stood on an equality as to right, except as to time, but in the case at bar, while it is admitted that the railroad is a *quasi* public highway, the street sought to be opened up is *purely* a public highway, and as such the

rights of the public therein are paramount to the rights of the railroad.

If courts and counsel would pay less attention to case law and instead should base themselves upon established principles, we think there would be more consistency and less uncertainty in the administration of the law.

If we understand the contention of plaintiff in error, it is that a railroad company must make the crossing where a public highway crosses its track at its own expense, unless such crossing necessitates a *structural change* of the railroad, but if such change is involved, then the expense of the same must be borne by the public. Why? Where is the statute which so provides? Upon what maxim or principle is it founded? What is a structural change? Is not any physical change whatever a structural change? Railroads and embankments at crossings are natural bodies, not spiritual, and any change whatever must be a structural change.

There might be some show of reason for the claim, that if the change was so trifling that a road supervisor could make it, that the public should make such crossing, but if the engineering difficulties were such that it was necessary to have the services of an expert railroad builder, in such case the burden should fall on the railroad company, which would, presumably, be best prepared to handle the work; but for appellant's contention there is no reason whatever.

Again, what is to be deemed a sufficient structural change to release a railroad from the expense of making a crossing and to cast the burden on the people? As plaintiff in error admits, if the crossing is at grade, that the railroad company is bound to make it, what would be a sufficient inequality of grade between the street or highway and the railroad to relieve the latter from the expense of making such crossing?

As the statute casts the burden of making the crossing upon a railroad company, and that, without reference to whether a public highway was laid out before or after the construction

of the railroad track, suppose Grand avenue had been opened up before the railroad was built, would any one contend that the railroad company could legally have cut it in two with its embankment? Or would learned counsel have insisted that the public should have borne the expense of the overhead crossing? We think not, and that the railroad company would have been bound to make the crossing at its own expense. And it is equally true that the duty to make the crossing is the same without regard to whether the street existed or not when the railroad was built, and the law casts the burden of making the crossing in question upon the railroad company, and, therefore, it was entitled to no damages whatever.

We do not think that in any just sense, any property of plaintiff in error is being appropriated by the defendant; if it had but an easement it has such easement still; if it had a fee simple its fee simple is still retained. The defendant in error does not even appropriate the embankment to its own use. The only requirement made by it is that Grand avenue be opened up for the use of the public as a highway or street, and the only expense occasioned to the plaintiff in error will be the making of a safe and convenient crossing at such street, which duty is by law charged upon the plaintiff in this court.

When the railroad in question was built its owners must have contemplated an increase of population and business in Connersville; this has come and the railroad has no doubt reaped a rich harvest on account thereof; so the fact that the streets of such city would be lengthened and new streets laid out must also have been contemplated, and plaintiff in error is in no position to receive the benefit of such increase in business and at the same time to repudiate the attendant burdens.

It may be that the decision of the Supreme Court of Ohio in *C., etc., Co. v. City of Troy*, 68 Ohio St. 510, seems to favor the contention of the plaintiff in error, but in so far as it does so, we think it is unsupported by principle, and that it is com-

pletely at variance with the decisions of this court heretofore cited.

It seems to us that this court has fully settled the law in the case at bar in the decision rendered in *Northern Pacific Railway Co. v. The State of Minnesota ex rel. City of Duluth*, 208 U. S. page 583. At pages 596, 597, the court says:

"There can be no question as to the attitude of this court upon this question, as it has been uniformly held that the right to exercise the police power is a continuing one; that it cannot be contracted away, and that a requirement that a company or individual comply with reasonable police regulations without compensation is the legitimate exercise of the power and not in violation of the constitutional inhibition against the impairment of the obligation of contracts. In *New York & New England Railroad Company v. Bristol*, 151 U. S. 556, 567, the doctrine was thus laid down by Chief Justice Fuller, speaking for the court:

" 'It is likewise thoroughly established in this court that the inhibitions of the Constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process, or of the equal protection of the laws, by the states, are not violated by the legitimate exercise of legislative power in securing the public safety, health and morals. The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulations in particulars essential to the preservation of the community from injury. *Beer Co. v. Massachusetts*, 97 U. S. 25; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659; *Barbier v. Connolly*, 113 U. S. 27; *New Orleans Gas Company v. Louisiana Light Company*, 115 U. S. 650; *Mugler v. Kansas*, 123 U. S. 623; *Budd v. New York*, 143 U. S. 517.'

"The principle was recognized and enforced in *Chicago, Burlington & Quincy R. R. Co. v. Chicago*, 166 U. S. 226,

where it was held that the expenses incurred by the railroad company in erecting gates, planking at crossings, etc., and the maintenance thereof, in order that the road might be safely operated, must be deemed to have been taken into account when the company accepted its franchise from the state, and the expenses incurred by the railroad company, though upon new streets, might be required as essential to the public safety. In *Detroit Railroad Co. v. Osborne,* 189 U. S. 383, it was held that the State of Michigan might compel a street railroad to install safety appliances at an expense to be divided with a steam railroad company occupying the same street, notwithstanding the steam railroad was the junior occupier of the street. The subject was further under consideration in *New Orleans Gas Light Co. v. Drainage Commission of New Orleans,* 197 U. S. 453, where it was held, that although the gas company had permission from the city to lay its pipes under the streets, it might be required to remove the same at its own expense, in the exercise of the police power in the interest of the public, in order to make way for a system of drainage which was required, in the interest of the public health, without compensation to the gas company; and that uncompensated obedience to regulations for public safety under the police power of the state was not a taking of property without due process of law.

The same principles were recognized and the previous cases cited in *Chicago, Burlington & Quincy Ry. Co. v. People of the State of Illinois ex rel. Drainage Commissioners,* 200 U. S. 561, and again in *Union Bridge Co. v. United States,* 204 U. S. 364. The result of these cases is to establish the doctrine of this court to be that the exercise of the police power in the interest of public health and safety is to be maintained unhampered by contracts in private interests, and that uncompensated obedience to laws passed in its exercise is not violative of property rights protected by the Federal Constitution."

Counsel for the plaintiff in error say of this case and many others of similar import that they are to be *distinguished*. It seems to us that the exigencies of their case would be much better served if all of these authorities could be *extinguished*.

It is insisted on behalf of the plaintiff in error that its railroad cannot be crossed at the point in question and that it is, therefore, safe for the public and that the police power can have no application, but as we have heretofore shown there is a path crossing the railroad at this point and it has been used as a crossing for years. Those persons using this path are not trespassers because it is a legally established highway crossing and they are entitled to the rights of travelers at crossings, and cannot be treated as trespassers. If user was necessary in order to enable the public to invoke the police power it would seem that this would be sufficient.

But we deny that user is necessary. The street in question has been legally established. It should be opened and, as for many purposes, that is considered as done, which should be done, the rights of the public are no less than if the crossing was less difficult. The most that can be said is that the crossing is very difficult and inconvenient and doubtless dangerous. Certainly pedestrians can pass over the road, and it is not impossible to take vehicles across. That the expense, trouble and danger would be great furnishes no reason why it should not be made convenient.

It seems to us childish to insist that the right of the public to cross depends upon whether it has been crossed or whether it is possible under present conditions to cross such railroad. The argument of plaintiff in error that there is no danger to be guarded against we think is decidedly original. We suppose that there is no danger at any railroad crossing provided the people will kindly refrain from ever going upon it.

It has been settled by the municipal authorities having sole jurisdiction that it is a public necessity for Grand avenue to be opened through the point in question. The plaintiff in error

has stubbornly refused to open up its embankment so that this portion of the street may be conveniently used. The defendant in error could no doubt have proceeded by mandate, but it chose to adopt the less drastic procedure under the power of eminent domain. The damages awarded in the lower court amounted to $800. While we do not and did not believe that any damages should be awarded, in order to end litigation the defendant in error made no objection to the amount of damages and assigned no cross-errors in the Supreme Court of Indiana. The judgment was affirmed and we confidently submit that no constitutional right of plaintiff in error was infringed.

We cite the court to the case of *St. Paul, Minneapolis & Manitoba Ry. Co. and Great Northern Ry. Co. v. The State of Minnesota ex rel. City of Minneapolis,* No. 162, decided by this court on April 26th of the present year. We also refer the court to the able and exhaustive brief filed by the defendant in error in that cause.

The defendant in error respectfully submits that this cause ought to be dismissed because no federal question is involved or that the judgment of the Supreme Court of Indiana should be in all things affirmed.

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CINCINNATI, INDIANAPOLIS AND WESTERN RAILWAY COMPANY *v.* CITY OF CONNERSVILLE.

ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

No. 19. Submitted October 25, 1910.—Decided November 28, 1910.

A railway corporation accepts its franchise from the State subject to the condition that it will conform at its own expense to any regulations as to the opening or use of streets which are reasonable and proper and have for their object public safety and convenience and which may, from time to time, be established by the municipality,

within whose limits the company operates, proceeding under legislative authority.

The power, whether called police, governmental or legislative, exists in each State, by appropriate legislation not forbidden by its own, or the Federal, constitution to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and, therefore, to provide for the public good and convenience. *Lake Shore & Michigan Southern Ry. Co.* v. *Ohio*, 173 U. S. 285, 298.

A railway company is not deprived of its property without due process of law either under the Fifth or the Fourteenth Amendment because in a street opening proceeding it is not awarded, in addition to the value of the land taken, the cost of the new structure which must necessarily be erected to carry its right of way over the street, as required for the safety and convenience of the public.

170 Indiana, 316, affirmed.

THE facts, which involve the constitutionality under the Fourteenth Amendment of proceedings of a street opening through a railway embankment, are stated in the opinion.

Mr. John B. Elam, with whom *Mr. James Fesler*, *Mr. Harvey J. Elam* and *Mr. Reuben Conner* were on the brief, for plaintiff in error:

A right was claimed under the United States Constitution and the highest court of Indiana in its opinion expressly denied that right, hence this court has jurisdiction. *Haire* v. *Rice*, 204 U. S. 291; *San Jose Land Co.* v. *San Jose Ranch Co.*, 189 U. S. 177; *Green Bay &c.* v. *Patten*, 172 U. S. 58.

The Fourteenth Amendment requires that when property is taken by power of eminent domain compensation must be made to the owner. *C., B. & Q. Ry.* v. *Chicago*, 166 U. S. 226.

When part of an entire property is taken under the power of eminent domain, the owner is entitled to compensation on account of what is taken and also for injury to what remains. *Chicago Ry. Co.* v. *Huncheon*, 130

Indiana, 529; *Chicago &c. Co.* v. *Hunter*, 128 Indiana, 213; *White* v. *Chicago Co.*, 122 Indiana, 317; *Rehman* v. *New Albany R. R. Co.*, 8 Ind. App. 200.

The measure of damages is the difference between the value of the entire property before the appropriation and of what remains immediately after such appropriation. *Sidener* v. *Essex*, 22 Indiana, 201; *Fifer* v. *Ritter*, 159 Indiana, 8; *Louisville &c. Co.* v. *Sparks*, 12 Ind. App. 410; *Sunnyside Co.* v. *Reitz*, 14 Ind. App. 478; *Lake Erie R. R. Co.* v. *Lee*, 14 Ind. App. 328.

When part of an entire property is taken under the power of eminent domain, the owner must be compensated for what is taken and for damages to that which remains, and unless this is done, such owner is deprived of his property without just compensation, without due process of law, and is denied the equal protection of the laws within the meaning of the Fifth and Fourteenth Amendments. *In re Street Opening* (Mich.), 26 N. W. Rep. 159; *Village* v. *Pere Marquette Co.* (Mich.), 102 N. W. Rep. 947; *Chicago &c. Co.* v. *Springfield &c. Co.*, 67 Illinois, 142; *St. Louis &c. Co.* v. *Springfield &c. Co.*, 96 Illinois, 274; *Chicago &c. Co.* v. *Jacobs*, 110 Illinois, 414; *Robb* v. *Maysville &c. Co.*, 60 Kentucky, 117; *Lake Shore &c. Co.* v. *Chicago &c. Co.*, 100 Illinois, 21; *Chicago &c. Co.* v. *Chicago*, 166 U. S. 226; *Commissioners* v. *Michigan &c. Co.* (Mich.), 51 N. W. Rep. 934; *Commissioners* v. *Canada &c. Co.* (Mich.), 51 N. W. Rep. 447.

When property of a railroad company is taken for another public use, the same rules as to compensation apply as in the case of an individual owner. *Lake Shore &c. Co.* v. *Chicago &c. Co.*, 100 Illinois, 21, 31; *Chicago &c. Co.* v. *Englewood &c. Co.*, 115 Illinois, 375, 384.

When property that has a peculiar value to the owner on account of its being devoted and adapted to a particular use is taken for a public use the owner should be compensated for such taking by assessing damages at

such value. *Ohio Valley Co.* v. *Keith*, 130 Indiana, 314; *Price* v. *St. Paul &c. Co.*, 27 Wisconsin, 98; *King* v. *Minneapolis &c. Co.*, 32 Minnesota, 224; *Dupuis* v. *Chicago &c. Co.*, 115 Illinois, 97; *Chicago &c. Co.* v. *Chicago &c. Co.*, 112 Illinois, 589; *Denver &c. Co.* v. *Griffith* (Colo.), 31 Pac. Rep. 171; *Cincinnati &c. Co.* v. *Longworth*, 30 Ohio St. 108; *Shenango &c. Co.* v. *Braham*, 79 Pa. St. 447; Sutherland on Damages, § 1074.

When a street is opened, as this was, through an embankment which is part of a railroad right of way, the damages caused to the railroad company should include the expense of the changes necessarily and proximately resulting from such removal. *Baltimore &c. Co.* v. *State*, 159 Indiana, 510; *Cincinnati &c. Co.* v. *City*, 68 Ohio St. 510; *City* v. *Grand Rapids &c. Co.* (Mich.), 33 N. W. Rep. 15; *St. Louis &c. Co.* v. *Springfield &c. Co.*, 96 Illinois, 274; *Colusa County* v. *Hudson*, 85 California, 633; *Terre Haute &c. Co.* v. *Crawford*, 100 Indiana, 550; *Lake Erie &c. Co.* v. *Commissioners*, 63 Ohio St. 23; *Morris &c. Co.* v. *City* (N. J.), 43 Atl. Rep. 730.

The expense of substitution of a bridge to carry a track over a street, which will in no way add to safety or convenience is not one that a railroad company can be required to incur under the exercise of the police power. If the damages awarded for the street opening do not include the expense of such structure, then its property is taken without just compensation and without due process of law. *Lake View* v. *Rose &c. Co.*, 70 Illinois, 191; *Ritchie* v. *People*, 155 Illinois, 98; *Chicago &c. Co.* v. *City*, 140 Illinois, 309; *Morris &c. Co.* v. *City* (N. J.), 43 Atl. Rep. 730; *Lake Erie &c. Co.* v. *Shelley*, 163 Indiana, 36; *Chicago &c. Co.* v. *People*, 200 U. S. 561; Lewis on Eminent Domain, § 6.

The following authorities are to be distinguished: *C., B. & Q. R. R. Co.* v. *Chicago*, 166 U. S. 226; *C., B. & Q. Ry. Co.* v. *Drainage Commissioners*, 200 U. S. 561; *North-*

ern &c. Co. v. *Minnesota*, 208 U. S. 583; *Lake Erie &c. Co.* v. *Shelley*, 163 Indiana, 36; *So. Ind. Railway Co.* v. *McCarrell*, 163 Indiana, 469; *Chicago &c. Co.* v. *State*, 158 Indiana, 189; *Chicago &c. Co.* v. *Zimmerman*, 158 Indiana, 189; *Vandalia &c. Co.* v. *State ex rel.*, 166 Indiana, 219; *Chicago &c. Co.* v. *State*, 159 Indiana, 237.

The statute of the State of Indiana upon which the Supreme Court of Indiana relied cannot be so construed without making it conflict with the Fourteenth Amendment. Every railroad corporation in Indiana possesses by statute the general powers, subject to liabilities and restrictions, to construct its road upon or across any stream of water, water-course, road, highway, railroad or canal, so as not to interfere with the free use of the same which the route of its road shall intersect, in such manner as to afford security for life and property; but the corporation shall restore the stream or water-course, road or highway, thus intersected, to its former state, or in a sufficient manner not to unnecessarily impair its usefulness or injure its franchises. 2 Burns' R. S., 1901, § 5153; *State ex rel.* v. *Indianapolis &c.*, 160 Indiana, 145.

Mr. R. N. Elliott, with whom *Mr. Hyatt L. Frost*, *Mr. Charles F. Jones* and *Mr. David W. McKee* were on the brief, for defendant in error.

Mr. Justice Harlan delivered the opinion of the court.

The Common Council of Connersville, Indiana, adopted a resolution declaring that a railway embankment, maintained by the Cincinnati, Indianapolis and Western Railway Company, the plaintiff in error, across Grand Avenue, in that city, obstructed passage between the north and south ends of the avenue; also, that such avenue should, as a matter of public necessity, be opened as a public street through said railroad embankment.

The question of the expediency, advisability and public utility of opening up the avenue through the embankment was thereupon referred to the City Commissioners, and to the Council's Committee on Streets, Alleys and Bridges, for action. Upon consideration of the matter at a time of which public notice was duly given, and after an examination of the ground sought to be appropriated, the Commissioners reported that the opening of the avenue through the railroad embankment would be of public utility. The report stated that the real estate to be appropriated by the opening of the avenue was so much of the railroad embankment as extended the entire width of the avenue, as then used and opened, immediately north and south of such embankment. The tract sought to be appropriated was 66 feet square and was occupied by the embankment. The Commissioners found and reported that no real estate would be damaged by the proposed opening other than that sought to be appropriated, and that the real estate abutting on both sides of the avenue would be benefited by the proposed opening of the street. There was a hearing—after due notice to all parties concerned, including the railroad company—of the question of injuries and benefits to the property to be appropriated, and of the benefits and damages to all real estate resulting from the opening of the avenue. The result of the hearing was a report by the City Commissioners in favor of the opening, and the value of the real estate sought to be appropriated was estimated at $150.

The City Council adopted the report of the Commissioners, and appropriated for the purpose of opening Grand Avenue the real estate described in the report as necessary to such opening—the property here in question being a part of that to be appropriated. The Council also directed that a certified copy of so much of the report as assessed benefits and damages be delivered to the

Treasurer of the city, and copied in full on the records of the Council with the minute of the adoption of the resolution describing the real estate appropriated.

There were various exceptions by the railway company and by the city, followed by a trial before a jury which found for the railway company and assessed its damages at $800. A motion by the company for a new trial having been overruled and a judgment entered for the defendant company, in the state court of original jurisdiction, the case was carried to the Supreme Court of Indiana (which affirmed the judgment) and it is now here for a reëxamination as to certain Federal questions raised by the railway company.

It was not disputed at the trial that the improvement of Grand Avenue, as ordered by the city of Connersville, made it necessary to construct a bridge over and across the avenue as reconstructed.

The trial court gave the following, among other instructions, to the jury: "It being the duty of the defendant railroad company to construct and keep in safe and good condition all highway crossings, the defendant in this action would not be entitled to any damages for constructing the necessary crossing nor abutments and bridge for supporting its railroad over and across said street when constructed."

It refused to give this instruction asked by the railway company: "If the appropriation of the defendant's property under the proceedings set forth in this case will necessarily and proximately cause expense to the defendant in constructing a bridge to carry its railroad over the proposed street in order that its railroad tracks may have support and its railroad may be operated as such, and as an entire line, and such construction of said bridge will be required for no other purpose, then, in determining the defendant's damages, you should consider the expense of constructing such bridge."

The railway company duly excepted to this action of the trial court, but the Supreme Court of Indiana held that there was no error.

There are twenty assignments of error, accompanied by an extended brief of argument. In addition, a great many authorities are cited by the learned counsel for the railway company. If we should deal with each assignment and argument separately, and enter upon a critical examination of the authorities cited, this opinion would be of undue length. We think the case is within a very narrow compass. This seems to be the view of learned counsel of the plaintiff in error, for, after a general reference to various questions raised at the trial, counsel say that "the case upon final analysis reduces itself to the question whether the police power [of the State] can be so applied as to require the railroad company to build the bridge without compensation."

If the railway company was not entitled to compensation on account of the construction of this bridge—whether regard be had to the Fifth or the Fourteenth Amendments of the Constitution or to the general reserved police power of the State—then it is clear that the jury were not misdirected as to what should be considered by them in estimating the damages which, under the law, the railway company was entitled to recover.

The question as to the right of the railway company to be reimbursed for any moneys necessarily expended in constructing the bridge in question is, we think, concluded by former decisions of this court; particularly by *C., B. & Q. Railway* v. *Drainage Com'rs*, 200 U. S. 562, 582, 584, 591; *N. O. Gas Co.* v. *Drainage Com'rs*, 197 U. S. 453; *N. Y. & N. E. R. R. Co.* v. *Bristol*, 151 U. S. 556, 571; *C., B. & Q. R. R. Co.* v. *Chicago*, 166 U. S. 226, 254; *Transportation Co.* v. *Chicago*, 99 U. S. 635. See also *Union Bridge Co.* v. *United States*, 204 U. S. 364. The railway company accepted its franchise from the State,

subject necessarily to the condition that it would conform at its own expense to any regulations, not arbitrary in their character, as to the opening or use of streets, which had for their object the safety of the public, or the promotion of the public convenience, and which might, from time to time, be established by the municipality, when proceeding under legislative authority—within whose limits the company's business was conducted. This court has said that "the power, whether called police, governmental or legislative, exists in each State, by appropriate enactments not forbidden by its own constitution or by the Constitution of the United States, to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and therefore to provide for the public convenience and the public good." *Lake Shore &c. Co.* v. *Ohio*, 173 U. S. 285, 297.

Without further discussion, and without referring to other matters mentioned by counsel, we adjudge upon the authority of former cases, that there was no error in holding that the city could not be compelled to reimburse the railway company for the cost of the bridge in question.

Judgment affirmed.